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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**STATE OF IDAHO.**

**By I. W. HART.**  
**(Ex-officio Reporter.)**

**VOLUME 18.**

**SAN FRANCISCO:**  
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## OFFICERS OF COURT.

### Clerk.

I. W. HART.....Appointed April 15, 1907

### Attorney General.

D. C. McDOUGALL.....Elected 1908

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\*Appointed for new district, consisting of Bonner and Kootenai Counties, created by act of legislature approved March 15, 1909.

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# Roll of Attorneys Admitted to Practice in Supreme Court.

(This list includes all admissions up to October 24, 1910. Names of those known to be deceased are indicated by an asterisk.)

| Date Admitted                       | Date Admitted                        |
|-------------------------------------|--------------------------------------|
| Adams, Asa A.....Feb. 7, 1907       | Bartlett, Francis H....Feb. 26, 1907 |
| Adams, Gardner G....Dec. 7, 1906    | Bartlett, Thomas H....Oct. 20, 1904  |
| Adams, George W....Sept. 20, 1880   | Bartley, T. W.....Mar. 23, 1906      |
| Adams, Joseph M....Apr. 16, 1900    | Batten, Orlando B....Feb. 24, 1886   |
| Adamson, Wm. W....June 1, 1905      | Batting, William H....Oct. 29, 1903  |
| Ailshie, James F....Mar. 20, 1893   | Bauman, Louis A....June 21, 1909     |
| Ainslie, George.....June 6, 1866    | Beakley, William A....Feb. 27, 1909  |
| Akins, John D.....May 23, 1904      | Beale, Charles W.....Sept. 7, 1891   |
| Alden, Herbert A....Feb. 18, 1905   | *Beatty, E. T.....Jan. 11, 1869      |
| Allen, Albert.....Jan. 10, 1887     | Beatty, James H.....Jan. 23, 1884    |
| Allen, Frank D.....Oct. 21, 1908    | Becker, John B.....Mar. 30, 1903     |
| Alley, William.....Mar. 1, 1909     | Bell, Frank S.....June 4, 1910       |
| Allison, F. E.....Oct. 10, 1905     | Bellinger, Victor C....Mar. 22, 1894 |
| Alvord, Adelbert A....Mar. 20, 1905 | Bender, John O.....Oct. 26, 1903     |
| Andersen, James H....Nov. 17, 1909  | Bennett, Brayton S....Oct. 21, 1903  |
| Anderson, Ausfrid L..Feb. 10, 1910  | Bennett, H. M.....Jan. 11, 1886      |
| Anderson, John B....Apr. 9, 1902    | Bennett, T. W.....Feb. 24, 1872      |
| Anderson, Louis N. B.Feb. 10, 1897  | Bennett, Thomas E....Nov. 12, 1909   |
| Anderson, Peter A....Mar. 5, 1909   | Bentley, Finis.....Oct. 20, 1908     |
| Anderson, Robert S....Oct. 4, 1899  | Berg, Edward H.....Mar. 22, 1910     |
| Anderson, Roscoe J....July 21, 1910 | Berridge, Nathaniel G..Dec. 6, 1904  |
| *Anderson, V. S.....Jan. 14, 1867   | Bealy, Charles.....Oct. 12, 1908     |
| Angel, Richard M....Nov. 18, 1902   | *Bierbower, V.....Jan. 11, 1888      |
| *Angel, Texas.....Jan. 12, 1885     | Birdsall, Wm. T.....June 19, 1905    |
| Applewhite, John C....Mar. 23, 1906 | Bissell, Wm. G.....Nov. 12, 1909     |
| Arnold, Earl C.....May 11, 1910     | Black, Roy L.....Mar. 15, 1909       |
| Arrison, D. William...Oct. 10, 1904 | Blaine, Samuel E....May 21, 1904     |
| Ashton, James M....Dec. 14, 1892    | Blair, Joseph H.....Dec. 7, 1896     |
| *Athey, M. C.....Nov. 11, 1891      | Blake, John J.....Dec. 19, 1894      |
| Auboele, Max O.....Apr. 7, 1909     | Blewett, Robert L....Jan. 23, 1905   |
| Averitt, Philetus....Feb. 24, 1899  | *Blickensderfer, E. P..Nov. 18, 1891 |
| Ayers, John W.....Feb. 13, 1891     | Bogart, James S.....Feb. 19, 1908    |
| Ayers, Ray B.....Feb. 11, 1907      | Boomer, Jasper H....May 20, 1904     |
|                                     | Booth, Clarence M....Mar. 3, 1910    |
| Babb, James E.....Oct. 10, 1892     | Borah, William E....Feb. 16, 1891    |
| Babcock, Wm. A.....May 15, 1907     | Borden, A. J.....Nov. 20, 1891       |
| †Badger, J. W.....Feb. 9, 1891      | Bothwell, James R....Dec. 6, 1906    |
| Bagley, John A.....Oct. 10, 1892    | Boughton, Eugene V....Oct. 1, 1907   |
| Bailey, Douglas W....Oct. 7, 1901   | Bowen, Adna H.....June 26, 1908      |
| Baldwin, Charles H....Apr. 9, 1902  | Bowen, Arthur M....May 23, 1906      |
| Ball, George S.....Oct. 25, 1895    | *Bowen, A. O.....Feb. 24, 1869       |
| Ballentine, James A..Nov. 29, 1899  | Bower, C. D.....Jan. 19, 1892        |
| Barber, Ira E.....May 14, 1902      | Boyd, Cornelius A....Jan. 7, 1904    |
| *Barbour, Clitus.....Jan. 12, 1871  | Boyer, Howard J.....Feb. 2, 1909     |
| Barclay, Adam B.....Jan. 20, 1909   | Bradford, Burton P....Jan. 11, 1905  |
| Barnard, Carl.....Aug. 3, 1910      | †Bradley, Frank L....May 6, 1907     |
| Barnes, Evans P....Feb. 26, 1910    | Brasie, N. Eugene....Nov. 18, 1907   |
| Barnum, Guy C.....Jan. 14, 1897     | *Brayman, Mason.....Jan. 17, 1877    |
| Barrette, William J..June 19, 1905  | Brearley, E. C.....Feb. 2, 1885      |

†Disbarred, Feb. 6, 1894.

‡Disbarred, May 25, 1908.

| Date Admitted.                          | Date Admitted.                         |
|-----------------------------------------|----------------------------------------|
| Breen, Peter.....Oct. 4, 1899           | Conner, B. F.....Mar. 4, 1891          |
| Brickenstein, Albert H.....May 20, 1907 | Conner, Henry F.....Oct. 19, 1908      |
| Briggs, Burdick G.....Jan. 23, 1904     | Cook, Roy R.....Nov. 12, 1909          |
| Brinck, Dana E.....Oct. 28, 1909        | Cooke, Herman R.....Nov. 27, 1895      |
| Brittenham, Chas. H.....Dec. 18, 1905   | Costello, W. Frank.....Jan. 21, 1885   |
| *Brizee, George W.....Jan. 17, 1888     | Coulter, Edwin R.....May 26, 1905      |
| Brodhead, William A.....May 14, 1904    | Coutts, George W.....Mar. 20, 1896     |
| *Brown, Arthur.....Feb. 4, 1886         | Cowen, Frederick J.....Jan. 21, 1904   |
| Brown, John A.....Apr. 19, 1898         | Cox, David M.....Jan. 28, 1904         |
| Brown, Jonas W.....Jan. 28, 1869        | Cox, Eugene A.....Oct. 7, 1902         |
| Brown, Milton A.....Dec. 24, 1895       | Coxe, Charles B.....Oct. 17, 1899      |
| *Brumback, Jeremiah.....Jan. 5, 1869    | *Cozier, Robert V.....Mar. 16, 1896    |
| Bruner, P. M.....Jan. 9, 1888           | Crandall, Charles M.....Aug. 28, 1909  |
| Bryan, Ed L.....June 30, 1906           | Crane, Addison A.....Jan. 14, 1908     |
| *Buck, Norman.....Sept. 1, 1879         | Crawford, James G.....Jan. 8, 1905     |
| Buckner, Thomas E.....Dec. 11, 1908     | Crawford, Willard.....Sept. 15, 1880   |
| Budge, Alfred.....Feb. 16, 1901         | Crockett, Fred W.....Feb. 23, 1909     |
| Budge, Jesse R. S.....Jan. 28, 1903     | Crow, Benjamin S.....Oct. 31, 1903     |
| Budlong, David H.....Nov. 9, 1896       | Culp, Lynn W.....Sept. 6, 1909         |
| Bugge, Hans.....Oct. 7, 1902            | Culver, Frederick D.....Oct. 18, 1905  |
| Buller, Reginald F.....Mar. 9, 1894     | Cunningham, Richard.....Dec. 8, 1903   |
| Bunn, John M.....Aug. 5, 1899           | *Curtis, E. J.....May 31, 1886         |
| Burgan, Fred L.....Dec. 7, 1891         | *Curtis, Edward L.....Jan. 18, 1888    |
| Burket, Charles O.....Dec. 23, 1909     |                                        |
| Burleigh, Harley F.....Oct. 9, 1893     | Dampier, Edward R.....Oct. 28, 1909    |
| *Burmeister, Theodore.....June 1, 1866  | Danford, Frank.....Oct. 17, 1898       |
| Burtenshaw, Luther L.....Jan. 20, 1902  | Daniels, J. W.....Feb. 9, 1891         |
| Butler, Frederick E.....Mar. 19, 1906   | Davenport, William H.....June 11, 1866 |
|                                         | David, William L.....June 8, 1909      |
| Oage, Milton G.....Mar. 16, 1891        | Davidson, William B.....May 17, 1900   |
| Cahalan, Thomas D.....Feb. 29, 1872     | Davies, John E.....Feb. 5, 1907        |
| Caldwell, A. S.....Feb. 7, 1885         | Davis, Carl A.....Apr. 17, 1900        |
| Callahan, James A.....Nov. 26, 1906     | Davis, Charles E.....Feb. 19, 1896     |
| Carlson, George A.....Oct. 22, 1904     | *Davis, Edwin G.....Dec. 10, 1909      |
| Carter, Pasco B.....Dec. 28, 1908       | *Davis, John P.....Nov. 9, 1897        |
| Carter, Roswell, A.....May 28, 1904     | Davis, William E.....Sept. 19, 1910    |
| Cassady, William H.....May 9, 1904      | Davidson, W. Howard.....Nov. 25, 1901  |
| *Caton, N. T.....June 7, 1866           | DeCamp, Charles M.....July 5, 1906     |
| Cavanah, Charles C.....Dec. 2, 1895     | DeHaven, James.....Mar. 19, 1896       |
| Cavaney, Peter E.....May 6, 1907        | Dietrich, F. S.....Jan. 19, 1892       |
| *Chalmers, Edward E.....Jan. 21, 1895   | Denholm, Frank A.....Sept. 19, 1910    |
| Chance, Charles H.....Mar. 23, 1910     | *Denning, Stewart S.....Oct. 10, 1892  |
| *Chapman, Thomas.....Jan. 5, 1871       | Derbyshire, Arthur H.....Jan. 29, 1903 |
| Cherry, Ariel C.....Mar. 9, 1909        | Devaney, Henry J.....Dec. 27, 1905     |
| Church, Maxfield I.....June 19, 1906    | Devaul, John G.....Nov. 28, 1908       |
| *Claggett, William H.....Jan. 10, 1887  | Dial, Will H.....Nov. 20, 1894         |
| Clark, Chas. A.....Feb. 20, 1908        | Dickinson, Albert S.....Feb. 6, 1909   |
| Clark, David Worth.....May 18, 1908     | Disney, Frank T.....Feb. 2, 1908       |
| *Clark, Nathan H.....Jan. 19, 1899      | Dockery, Edward J.....Nov. 17, 1897    |
| Cleland, William A.....May 4, 1908      | Doherty, Ligouri A.....Nov. 17, 1896   |
| Clifton, Charles.....Feb. 15, 1908      | Dolenty, Francis X.....Feb. 1, 1909    |
| Clinton, Lynne F.....Oct. 9, 1908       | Dolman, Carrole G.....Mar. 6, 1903     |
| Cobb, Charles.....Jan. 24, 1887         | Donaldson, Thomas.....Sept. 21, 1869   |
| Colburn, George C.....Dec. 18, 1906     | *Douthitt, D. W.....June 8, 1886       |
| Colvin, John F.....Feb. 26, 1906        | Doyle, Edward J.....Mar. 18, 1907      |
| Combs, Joseph.....June, 2, 1866         | Dreisbach, Ralph H.....Sept. 19, 1910  |
| Compton, William G.....May 21, 1906     | Dunbar, William C.....Jan. 22, 1903    |
| Conner, A. H.....Feb. 12, 1907          | Dunn, Robert N.....Apr. 8, 1902        |

|                             | Date Admitted. |
|-----------------------------|----------------|
| Dunning, Daniel A.....      | May 8, 1909    |
| *Dunton, Herbert W.....     | Feb. 8, 1890   |
| Easter, John B.....         | Apr. 20, 1898  |
| Eastman, Frank H.....       | Feb. 7, 1906   |
| *Eden, J. W.....            | Jan. 27, 1892  |
| Edgerton, Joseph W.....     | Jan. 24, 1910  |
| Edgington, George W.....    | Nov. 30, 1908  |
| Edmiston, Robert L.....     | Oct. 26, 1903  |
| Edmondson, P. E.....        | Jan. 11, 1869  |
| Edmunds, Ralph.....         | Feb. 8, 1909   |
| Edwards, C. H.....          | Feb. 9, 1907   |
| Elder, Robert H.....        | Mar. 21, 1906  |
| Elderkin, Platt B.....      | May 31, 1899   |
| Eldridge, J. B.....         | Apr. 16, 1907  |
| Elliott, Edward G.....      | Dec. 23, 1908  |
| Elliott, Ernest L.....      | Sept. 30, 1907 |
| Ellis, George F.....        | Apr. 24, 1909  |
| Elston, Judson A.....       | Oct. 7, 1908   |
| *Ensign, Francis E.....     | Jan. 16, 1867  |
| Ericsson, Lloyd H.....      | Oct. 16, 1905  |
| Estabrook, Frank.....       | Nov. 14, 1892  |
| Estabrook, Frank Jr.....    | May 15, 1909   |
| *Evans, Claude T.....       | Jan. 29, 1900  |
| Evans, David.....           | Jan. 18, 1898  |
| Fairchild, Sherman D.....   | Mar. 15, 1907  |
| Farquar, Ralph E.....       | June 14, 1906  |
| Featherstone, Albert H..... | Oct. 27, 1903  |
| Feltham, Lot L.....         | Feb. 27, 1893  |
| Fenn, Frank A.....          | Jan. 18, 1898  |
| *Fenn, S. S.....            | Jan. 8, 1871   |
| Fenton, James E.....        | Jan. 12, 1899  |
| Ferguson, John A.....       | June 20, 1910  |
| Ferguson, Herbert V. A..... | Dec. 18, 1893  |
| Ferris, George M.....       | Mar. 15, 1910  |
| Finn, Charles H.....        | Jan. 22, 1897  |
| Fisher, Harry L.....        | Jan. 21, 1896  |
| Fisher, Ralph B.....        | Oct. 29, 1903  |
| Fitch, Thomas.....          | Oct. 24, 1904  |
| Flynn, John M.....          | Mar. 21, 1907  |
| Fogg, Frank E.....          | Jan. 8, 1894   |
| Folsom, Myron A.....        | Dec. 13, 1900  |
| *Foote, B. E.....           | June 18, 1866  |
| Forney, James H.....        | Apr. 16, 1891  |
| *Fowler, Edward S.....      | Oct. 1, 1906   |
| Fox, Carlton.....           | Apr. 5, 1909   |
| Francis, William H.....     | Nov. 29, 1892  |
| Fraser, Alfred A.....       | Nov. 21, 1891  |
| Frawley, Edward J.....      | Dec. 5, 1894   |
| Frasier, James H.....       | Mar. 19, 1910  |
| Freehafer, Albert L.....    | June 17, 1905  |
| French, Burton L.....       | Jan. 14, 1903  |
| Freund, J. A. C.....        | Mar. 17, 1891  |
| Frost, Henry L.....         | Oct. 13, 1893  |
| Fulton, Robert F.....       | Oct. 12, 1904  |
| Funkhouser, A. M.....       | Feb. 26, 1886  |
| *Galbraith, Thomas J.....   | Sept. 4, 1882  |

|                           | Date Admitted. |
|---------------------------|----------------|
| Gallagher, Andrew E.....  | Apr. 20, 1897  |
| Galloway, James W.....    | Oct. 21, 1909  |
| *Ganahl, Frank.....       | Aug. 7, 1866   |
| Garrett, Irving S.....    | Dec. 5, 1905   |
| *George, Wyatt A.....     | June 1, 1866   |
| Gibson, Claude W.....     | June 25, 1904  |
| Gilbert, George I.....    | Jan. 14, 1867  |
| Gilbert, Winfred S.....   | Apr. 1, 1904   |
| Gilmore, Jesse M.....     | Apr. 3, 1908   |
| Givens, Raymond L.....    | May 10, 1909   |
| Glenn, Thomas L.....      | Jan. 15, 1895  |
| Glennon, Lawrence E.....  | Jan. 17, 1905  |
| Good, James E.....        | Sept. 9, 1908  |
| Good, John R.....         | Feb. 14, 1901  |
| Goode, George W.....      | Mar. 18, 1895  |
| Goode, John B.....        | Oct. 4, 1899   |
| Gordon, Merritt J.....    | Oct. 17, 1904  |
| Gorman, George H.....     | Sept. 7, 1891  |
| Gossman, George.....      | Jan. 12, 1885  |
| Gough, Aurelian B.....    | Jan. 12, 1897  |
| Gray, George E.....       | Nov. 14, 1891  |
| Gray, Henry S.....        | Mar. 20, 1909  |
| Gray, John P.....         | May 20, 1901   |
| *Gray, John S.....        | Feb. 18, 1871  |
| Greb, John W.....         | Mar. 24, 1906  |
| Green, A. J.....          | Mar. 22, 1892  |
| Green, Bertha S.....      | Dec. 8, 1904   |
| Green, John.....          | Mar. 18, 1896  |
| Green, Leslie B.....      | Oct. 11, 1900  |
| Greene, Hammond B.....    | Nov. 27, 1903  |
| Greenman, Frank H.....    | Oct. 9, 1902   |
| Greenough, Charles W..... | Sept. 11, 1909 |
| Gregory, Frederick W..... | June 9, 1909   |
| Griffith, Benjamin F..... | June 1, 1901   |
| Griffith, Edward M.....   | Mar. 31, 1904  |
| Griffith, Max Wilder..... | Mar. 28, 1904  |
| Griffiths, Henry A.....   | Nov. 16, 1897  |
| Griffiths, Walter.....    | Sept. 4, 1900  |
| Griffiths, Thomas C.....  | Dec. 8, 1893   |
| Guheen, John J.....       | Nov. 15, 1897  |
| Gullixson, Oscar T.....   | June 30, 1904  |
| Guthrie, William P.....   | Dec. 30, 1906  |
| Guyer, John A.....        | Mar. 21, 1896  |
| Gyde, James E.....        | Oct. 3, 1894   |
| Haag, Henry M.....        | July 21, 1910  |
| Haddock, Paul S.....      | Dec. 7, 1906   |
| Haga, Oliver O.....       | Dec. 28, 1898  |
| *Hagan, Albert.....       | Jan. 31, 1888  |
| Hagelin, Frederick A..... | Dec. 7, 1903   |
| *Halley, Thomas G.....    | Dec. 21, 1895  |
| Hall, Henry M.....        | June 5, 1908   |
| Hall, J. B.....           | Jan. 4, 1910   |
| Hall, William A.....      | Oct. 22, 1908  |
| Hall, William C.....      | Feb. 23, 1891  |
| Halveston, Tedford F..... | Dec. 4, 1893   |
| Hamel, Charles D.....     | June 12, 1909  |
| Hamer, Thomas R.....      | Jan. 20, 1904  |

| Date Admitted.                      | Date Admitted.                      |
|-------------------------------------|-------------------------------------|
| Hamilton, Samuel T....May 22, 1905  | Hodge, Gillies D.....Nov. 17, 1896  |
| Hampton, H. S.....Jan. 19, 1892     | Hogan, Joseph B.....May 12, 1908    |
| Hansbrough, George F..Jan. 10, 1903 | Hoge, Martin G.....Dec. 8, 1908     |
| Hanson, Walter H.....Oct. 8, 1905   | *Holbrook, E. D.....Jan. 24, 1870   |
| Hanson, William P....Feb. 17, 1909  | Holden, Arthur W....Feb. 8, 1909    |
| Happy, Cyrus.....Oct. 8, 1902       | Holden, Edwin M....Dec. 12, 1907    |
| Hardy, Asa S.....Oct. 29, 1903      | Holden, William H....Nov. 15, 1900  |
| Harger, David D....Sept. 12, 1910   | Holman, Henry E....Dec. 29, 1904    |
| Harria, Charles E....Feb. 11, 1907  | Holzheimer, Frank H..Feb. 13, 1906  |
| Harris, Frank.....Feb. 9, 1901      | Hopkins, James.....Oct. 21, 1904    |
| Harris, J. H.....Sept. 4, 1882      | Hough, George C.....Aug. 6, 1866    |
| Hart, Irving W.....June 24, 1904    | *Houston, Henry H....Jan. 14, 1895  |
| Hartson, Clinton H....Oct. 23, 1909 | Howard, Silas L.....Jan. 5, 1869    |
| Hartsock, Franklin E..Mar. 23, 1907 | *Howe, Jonathan M....Apr. 16, 1891  |
| Harvey, William L....Aug. 23, 1909  | Howie, W. C.....Feb. 24, 1891       |
| Hasbrouck, Frank D..Mar. 24, 1894   | Hubbard, Henry F....May 19, 1902    |
| *Hasbrouck, Sol.....Feb. 20, 1871   | Hudson, J. Nat.....Mar. 5, 1910     |
| Hasbrouck, Van Wag-                 | Huebener, George C....Dec. 12, 1904 |
| enen.....Apr. 20, 1898              | Huggan, Andrew.....Aug. 6, 1866     |
| Hastie, Thomas D.....Oct. 1, 1900   | Hulaniski, Edmund T..May 8, 1909    |
| Hattabaugh, Murray R..Nov. 3, 1903  | Hulser, Edward H....Dec. 4, 1908    |
| Hausen, Henry M.....Oct. 9, 1906    | Hunter, Edgar J.....Oct. 29, 1903   |
| Hawley, Edgar T.....Jan. 22, 1900   | *Huston, Joseph W....July 7, 1869   |
| Hawley, James H....Feb. 14, 1871    | Hutchinson, Lee.....May 13, 1901    |
| Hawley, Jesse B.....June 30, 1903   | Hutto, Frank A.....May 21, 1906     |
| Haydon, Ambrose P....May 13, 1903   | Hyatt, Willet R.....June 17, 1908   |
| Haydon, Curtis.....May 11, 1910     | Hyde, S. C.....Jan. 29, 1892        |
| Hayes, Robert.....Dec. 19, 1903     | *Hyndman, William....Dec. 27, 1893  |
| Hays, Charles M.....Oct. 28, 1878   | Isaacs, A. C.....Jan. 19, 1867      |
| Hays, Samuel H....Mar. 18, 1889     | Isham, A.....Jan. 2, 1871           |
| Headington, Wm. M....Apr. 20, 1898  | Iverson, Severin.....Oct. 7, 1902   |
| Healey, William.....Dec. 1, 1908    | *Jackson, Appleton E..May 26, 1903  |
| Hedrick, Joseph G....Nov. 3, 1909   | Jackson, Charles H....Jan. 8, 1906  |
| *Heed, Albert.....May 31, 1866      | Jackson, Henry D....Apr. 21, 1909   |
| Heist, Harlan D.....Apr. 19, 1909   | Jackson, Nelson D....Nov. 8, 1909   |
| Heitman, Charles Lee..Jan. 20, 1893 | Jackson, Orville E....Nov. 20, 1891 |
| Hemminger, William P..Nov. 30, 1908 | Jackson, Thomas S....Dec. 18, 1906  |
| Henderson, Henry P..Nov. 30, 1897   | Jennings, J. Byron....May 29, 1906  |
| *Henderson, Hiram H..May 9, 1904    | Johnson, Charles A....May 10, 1909  |
| *Henley, John C.....June 4, 1866    | *Johnson, E. P.....Jan. 23, 1884    |
| †Henry, Andrew M....Feb. 5, 1897    | Johnson, Henry Z....Jan. 14, 1889   |
| Henry, Bert W.....Nov. 23, 1908     | Johnson, Miles S....Apr. 21, 1899   |
| Henry, Samuel E....Jan. 28, 1895    | Johnson, Peter.....Apr. 7, 1902     |
| Herren, Samuel C....Mar. 18, 1896   | Johnson, Richard H..Nov. 29, 1892   |
| Herriott, George.....Feb. 2, 1909   | Johnson, R. Z.....Aug. 20, 1867     |
| Herzinger, Charles W..Feb. 10, 1905 | Johnson, Victor O....Sept. 12, 1910 |
| Hess, Adam K.....Apr. 11, 1907      | Johnston, James C....May 18, 1903   |
| Hewitt, Louis P.....May 11, 1910    | Jones, Caleb.....Dec. 13, 1898      |
| Heyburn, Elwood M....Nov. 18, 1893  | Jones, John W., Jr....Jan. 17, 1900 |
| Heyburn, Weldon B..Jan. 10, 1887    | Jones, Nathaniel V....May 19, 1908  |
| Hicks, Alden R.....Dec. 8, 1904     | Jones, Thomas D.....Feb. 9, 1909    |
| *Higbee, L. P.....Aug. 19, 1869     | Jones, Thos. J.....Feb. 16, 1891    |
| Higgins, William.....June 20, 1910  | Jones, Walter A.....Mar. 21, 1892   |
| Hilton, Orrin N.....Dec. 30, 1907   | Jones, Walter F.....Oct. 10, 1905   |
| Hindman, Albert C....May 11, 1910   | Jones, William C....Mar. 31, 1908   |
| *Hindman, Philip R....Dec. 5, 1905  | Kahn, Charles M.....May 2, 1899     |
| Hobbs, John W.....May 20, 1901      | Kasberg, Alexander...Mar. 19, 1906  |
| Hodge, Dwight E....Mar. 27, 1905    |                                     |

†Disbarred Feb. 8, 1909.

|                        | Date Admitted. |
|------------------------|----------------|
| Katerndahl, Richard W. | Feb. 10, 1909  |
| Keat, James A.         | Jan. 18, 1897  |
| Keeton, William D.     | June 20, 1910  |
| *Kelley, William       | Jan. 17, 1871  |
| Kenward, Ira W.        | Nov. 18, 1902  |
| Kerby, Frank M.        | Dec. 2, 1905   |
| Kerl, Thomas T.        | Mar. 8, 1909   |
| Kerna, Abner G.        | Apr. 21, 1897  |
| Kerr, John             | Oct. 22, 1904  |
| Kessler, Harry S.      | Jan. 31, 1903  |
| Keyser, Harry          | Mar. 5, 1909   |
| *Kimball, James N.     | Jan. 21, 1885  |
| King, Charles D.       | Jan. 15, 1887  |
| King, George M.        | Jan. 25, 1884  |
| King, Hawley S.        | Jan. 15, 1887  |
| King, Joseph R.        | Nov. 22, 1897  |
| Kingsbury, Charles F.  | May 21, 1900   |
| Kingsbury, S. B.       | Jan. 28, 1884  |
| *Kingsley, Calvin S.   | Jan. 12, 1878  |
| Kingsley, Charles S.   | Jan. 22, 1900  |
| Kinkaid, John          | Dec. 4, 1902   |
| Kinyon, Frank B.       | Dec. 31, 1902  |
| Kipp, Robert H.        | May 7, 1910    |
| Kirkpatrick, M.        | Jan. 23, 1884  |
| Knight, Henry P.       | Oct. 4, 1899   |
| Koelsch, Charles F.    | Nov. 16, 1897  |
| Kroeger, Gustave       | May 22, 1908   |
| Lackner, Edgar C.      | Dec. 19, 1907  |
| *Lamb, John M.         | Feb. 16, 1884  |
| Lamme, William J.      | Nov. 29, 1902  |
| Lamson, George W.      | Dec. 7, 1903   |
| *Landesman, John       | May 31, 1866   |
| Lane, John             | Apr. 19, 1898  |
| Langley, Frank         | Mar. 21, 1910  |
| Lantz, George D.       | Jan. 10, 1908  |
| *Larabee, Charles H.   | June 9, 1866   |
| *Law, William, Jr.     | May 31, 1866   |
| La Veine, Edward M.    | Mar. 20, 1906  |
| Lee, Thomas B.         | June 1, 1906   |
| Lee, William A.        | May 12, 1908   |
| Lee, William E.        | Oct. 8, 1906   |
| LeHane, W. C.          | May 31, 1906   |
| *Leland, Alonzo        | Jan. 2, 1872   |
| *Lemmon, Edward B.     | Jan. 25, 1886  |
| Lende, Olai A.         | Oct. 26, 1903  |
| Leonard, Harry H.      | Nov. 21, 1899  |
| Lewis, Joseph R.       | Jan. 2, 1872   |
| Lewis, Lawrence L.     | Oct. 10, 1906  |
| Lewis, William S.      | Nov. 27, 1894  |
| Libby, Chalmers H.     | Nov. 18, 1907  |
| *Lindaay, Robert H.    | Jan. 19, 1869  |
| Lingenfelter, Curg H.  | Oct. 27, 1903  |
| Linger, H. K.          | Feb. 27, 1909  |
| Lockhart, Henry W.     | Jan. 18, 1900  |
| *Lockwood, D. C.       | Nov. 17, 1891  |
| Long, John H.          | Mar. 26, 1907  |
| Longfellow, John H.    | Jan. 15, 1904  |

|                       | Date Admitted. |
|-----------------------|----------------|
| Longley, Charles O.   | Feb. 12, 1910  |
| Loughary, L.          | Mar. 21, 1892  |
| Lowe, Sylvester T.    | Feb. 8, 1909   |
| Lovejoy, Owen         | May 9, 1910    |
| Lovejoy, Wisner D.    | May 14, 1902   |
| Lucy, Leander M.      | May 23, 1904   |
| Lund, Charles P.      | Mar. 21, 1905  |
| Lyon, Charles O.      | Mar. 21, 1905  |
| Lyon, Fletcher H.     | Nov. 27, 1906  |
| Lyon, Luther M.       | May 6, 1909    |
| Macdonald, Ernest C.  | Apr. 18, 1898  |
| *Maloney, Thomas      | Jan. 28, 1905  |
| Martin, Frank         | Nov. 26, 1892  |
| Martin, Guy H.        | Sept. 16, 1909 |
| Martin, Henry         | Jan. 17, 1867  |
| Martin, Jeremiah C.   | May 6, 1909    |
| Martin, Paris         | Nov. 19, 1907  |
| Martin, Thomas L.     | Feb. 19, 1908  |
| Mathews, John M.      | Nov. 21, 1893  |
| Maughan, Willard W.   | Dec. 5, 1895   |
| May, J. J.            | Jan. 9, 1868   |
| Mayhew, A. E.         | Jan. 10, 1887  |
| Meadors, George T.    | Jan. 9, 1905   |
| Means, Frank H.       | Feb. 7, 1910   |
| Melvin, Charles E.    | Sept. 11, 1909 |
| *Merriman, Charles A. | Feb. 1, 1905   |
| Merritt, John W.      | Oct. 7, 1901   |
| *Merritt, Samuel A.   | June 11, 1866  |
| Miller, Allen         | Feb. 21, 1899  |
| Miller, Bert H.       | Sept. 19, 1910 |
| Miller, Charles E.    | Oct. 1, 1900   |
| Miller, D. T.         | Dec. 8, 1891   |
| *Miller, Franklin     | June 14, 1866  |
| Miller, Fred          | Oct. 27, 1903  |
| *Miller, Joseph       | June 1, 1866   |
| *Miller, Joseph B.    | Jan. 19, 1892  |
| Mills, Homer C.       | Feb. 7, 1910   |
| Millsaps, James D.    | Dec. 14, 1904  |
| Minor, Wirt           | Nov. 10, 1891  |
| Mitchell, Daniel C.   | Apr. 13, 1891  |
| Mitchell, Perry W.    | Oct. 17, 1905  |
| Monahan, Patrick W.   | D. c. 14, 1905 |
| Monroe, Finley        | Nov. 13, 1901  |
| Montandon, A. F.      | Jan. 12, 1886  |
| Moody, Ralph E.       | Mar. 20, 1909  |
| *Moody, Silas W.      | Feb. 6, 1885   |
| Moon, Charles R.      | Sept. 19, 1910 |
| Moore, Frank L.       | Apr. 19, 1897  |
| Moore, James Z.       | Oct. 28, 1903  |
| More, Elawson C.      | Oct. 4, 1899   |
| Moreland, J. C. N.    | Aug. 22, 1867  |
| Morgan, Albert L.     | Oct. 19, 1898  |
| *Morgan, John T.      | Dec. 10, 1897  |
| Morgan, Ralph T.      | May 2, 1893    |
| Morgan, William M.    | Oct. 9, 1894   |
| Morphy, Wallace N.    | Oct. 7, 1897   |
| Morrison, John T.     | Feb. 16, 1891  |

| Date Admitted.                           | Date Admitted.                          |
|------------------------------------------|-----------------------------------------|
| Mulalley, James J.....Mar. 28, 1906      | Nugent, Charles H.....Oct. 6, 1902      |
| *Mullen, Thomas.....Mar. 19, 1896        | *Nugent, Edward.....Jan. 15, 1867       |
| Munter, Adolph.....Oct. 27, 1908         | Nugent, John F.....Nov. 19, 1901        |
| Murray, Charles A.....Oct. 17, 1904      |                                         |
| Murray, John C.....Mar. 28, 1905         | O'Connor, William P.....Nov. 17, 1909   |
| Musgrove, Mark W.....Mar. 17, 1891       | Olden, Benjamin F.....May 15, 1900      |
| Myers, Maurice M.....Jan. 15, 1907       | Oliphant, Edwin B.....Feb. 8, 1897      |
| MacLane, John F.....May 21, 1906         | O'Malley, Peter C.....June 20, 1910     |
| McBee, Edwin.....Apr. 30, 1898           | *Onderdonk, James L.....Sept. 6, 1881   |
| McCall, Frank A.....May 9, 1910          | *O'Neill, Charles W.....Jan. 10, 1887   |
| McCarthy, Charles F.....Mar. 4, 1905     | O'Neill, Eugene.....Apr. 15, 1891       |
| McClain, Wirt.....Jan. 17, 1906          | O'Neill, Thomas J.....June 20, 1904     |
| McClear, James L.....Jan. 17, 1905       | Oppenheim, Benjamin                     |
| McClelland, Robert W.....June 26, 1908   | W.....Dec. 19, 1906                     |
| McConnell, Arthur H.....July 6, 1905     | Orland, Charles J.....Oct. 21, 1895     |
| McConnell, Benjamin F.....Mar. 22, 1898  | *Orr, Sample.....Sept. 7, 1891          |
| McConnell, William L.....Dec. 2, 1907    | Orr, Sample H.....Sept. 7, 1891         |
| McCracken, Robert M.....Jan. 21, 1902    | Orr, Solon.....Oct. 28, 1909            |
| McCue, John J.....Oct. 28, 1909          | Ostrom, Arthur W.....Nov. 15, 1909      |
| McCutcheon, Otis E.....May 9, 1904       | Owen, John M.....Dec. 8, 1906           |
| McCutcheon, Otto E.....Feb. 18, 1905     | Overschmidt, August H.....Mar. 21, 1905 |
| McDaniel, Edward H.....Jan. 5, 1869      |                                         |
| McDonald, Charles L.....Apr. 19, 1900    | Padgham, John H.....July 16, 1900       |
| McDonald, Charles T.....Mar. 29, 1904    | Paine, Karl H.....Apr. 28, 1897         |
| McDonald, John M.....Oct. 7, 1902        | Palmer, Harry J.....Nov. 19, 1895       |
| McDougall, D. C.....Nov. 19, 1891        | Park, Andrew T.....Nov. 5, 1909         |
| McDuffie, James T.....Jan. 25, 1901      | Parker, James W.....Feb. 5, 1887        |
| McElroy, Hugh E.....Nov. 20, 1891        | Parks, Wade R.....Oct. 8, 1902          |
| McFadden, James J.....May 14, 1904       | *Parsons, George M.....Oct. 11, 1892    |
| McFarland, Robert E.....Jan. 14, 1892    | Paxton, Ossian F.....Oct. 8, 1900       |
| McFarland, Samuel L.....Nov. 16, 1897    | Peebles, John M.....Jan. 8, 1906        |
| McFarland, William B.....Sept. 19, 1910  | Peet, Earl S.....June 4, 1910           |
| *McGowan, Andrew J.....Jan. 16, 1890     | Pemberton, John F.....May 26, 1906      |
| McGraw, E. W.....June 8, 1866            | Pence, Joseph T.....May 28, 1900        |
| McKern, W. T.....Feb. 19, 1885           | Perkins, J. Arthur.....Dec. 5, 1904     |
| McKinley, Russell A.....May 11, 1910     | Perkins, Marcus C. T.....Oct. 9, 1907   |
| McKissick, Robert B.....Oct. 12, 1906    | Perkins, Schuyler D.....Jan. 21, 1896   |
| McLaughlin, Daniel.....Dec. 12, 1900     | Perkins, William.....Apr. 17, 1900      |
| McMinimy, Grundy O.....Apr. 2, 1904      | Perky, Kirtland I.....Jan. 23, 1895     |
| McNamee, Clay.....Mar. 22, 1898          | *Perrill, Walter M.....Nov. 17, 1899    |
| McNaughton, William F.....Sept. 15, 1909 | Peters, William A.....Apr. 8, 1909      |
| McQuade, John A.....Aug. 20, 1867        | Peterson, Charles.....Oct. 29, 1903     |
|                                          | Peterson, Joseph H.....Dec. 2, 1905     |
| Neal, Benjamin F.....Jan. 19, 1904       | Pfirman, Franklin.....Mar. 17, 1909     |
| Neal, Charles F.....Feb. 16, 1898        | Phelps, Spencer E.....Nov. 26, 1906     |
| Needham, Daniel.....Apr. 17, 1899        | Pickett, G. G.....Feb. 9, 1891          |
| Negley, James S., Jr.....Feb. 6, 1888    | Pierce, Charles O.....Jan. 30, 1909     |
| Nelson, Adrian F.....Oct. 4, 1899        | Pierce, Frank.....May 20, 1901          |
| Nevin, Dewees C.....June 27, 1904        | Pinkham, A. J.....Jan. 28, 1888         |
| Nickerson, John E.....Oct. 6, 1902       | *Piper, Fred W.....Oct. 8, 1894         |
| Niday, John L.....Dec. 6, 1894           | Plowhead, John J.....Jan. 5, 1904       |
| Nisbet, John.....Oct. 12, 1908           | Poe, James W.....Apr. 16, 1891          |
| Nixon, James P., Jr.....Feb. 7, 1910     | Pollard, James A.....Mar. 9, 1894       |
| Noel, Robert D.....Oct. 8, 1908          | Polk, C. S.....Nov. 26, 1906            |
| Norris, John H.....May 9, 1910           | Pope, James P.....Nov. 17, 1909         |
| Norris, Robert B.....Feb. 8, 1907        | Porter, James W.....Sept. 19, 1910      |
| Nowlin, Samuel S.....Jan. 20, 1903       | Post, Frank T.....Mar. 30, 1908         |
| Noyes, Joseph S.....Apr. 17, 1907        | Potts, Claude H.....Apr. 2, 1908        |

| Date Admitted.                            | Date Admitted.                              |
|-------------------------------------------|---------------------------------------------|
| Powers, Orlando W. .... Jan. 31, 1895     | *Rogers, James J. .... May 20, 1901         |
| Prather, Clytus I. .... May 24, 1910      | Rogers, John O. .... May 25, 1905           |
| Prather, L. H. .... Feb. 9, 1884          | Rogers, Lindsay R. .... Dec. 2, 1902        |
| *Preston, H. L. .... May 31, 1866         | Roleson, Erwin M. .... Mar. 28, 1894        |
| Price, Celsus M. .... May 21, 1906        | Rooks, Charles L. .... Feb. 2, 1901         |
| *Price, Lyttleton. .... Jan. 14, 1885     | *Rosborough, J. B. .... June 5, 1866        |
| *Prickett, H. E. .... June 14, 1866       | Ross, John F. .... May 21, 1900             |
| *Pride, D. P. B. .... Jan. 26, 1884       | Ruick, Norman M. .... Sept. 20, 1880        |
| Pritchard, Louis M. .... May 19, 1902     | Rust, George H. .... May 28, 1906           |
| Propper, George T. .... Dec. 5, 1904      | *Ryan, Albert T. .... Jan. 21, 1898         |
| Puckett, William H. .... Feb. 28, 1898    | Ryan, Frank D. .... July 20, 1910           |
| Purves, Charles L. .... Feb. 7, 1910      | Ryan, William J. .... May 11, 1908          |
| Quarles, Gustave B. .... July 16, 1900    | Sallee, Broussais. .... June 2, 1908        |
| Quarles, Ralph P. .... Sept. 7, 1891      | Sammon, J. W. .... May 8, 1909              |
| Rankin, John K. .... June 20, 1910        | Sample, William A. .... Jan. 5, 1907        |
| Rapp, Vermell. .... May 20, 1903          | Samsel, John L. .... Oct. 2, 1899           |
| Raudabaugh, Orville. .... Feb. 18, 1905   | Samuels, Henry F. .... Apr. 21, 1897        |
| Rawlins, Joseph L. .... Jan. 22, 1889     | Sanborn, Orville C. .... Feb. 8, 1910       |
| Ray, Thomas E. .... Sept. 19, 1910        | Sanders, Earl. .... Oct. 3, 1906            |
| *Reddy, Patrick. .... May 31, 1899        | Savidge, W. H. .... Jan. 28, 1888           |
| Reddoch, Charles F. .... Mar. 10, 1909    | Scales, Wallace N. .... Apr. 17, 1900       |
| Redford, Abraham B. .... May 25, 1903     | *Scaniker, S. P. .... Jan. 15, 1867         |
| Redford, Hiram B. .... June 26, 1906      | Scatterday, Ralph B. .... Dec. 18, 1905     |
| Redwine, Hyram G. .... Jan. 12, 1897      | Schooler, John E. .... Jan. 3, 1905         |
| Reed, Bert A. .... Sept. 6, 1909          | Scott, Frank B. .... June 6, 1907           |
| Reed, Charles C. .... Oct. 3, 1908        | Seawell, John L. .... Dec. 9, 1904          |
| *Reed, Charles H. .... Sept. 22, 1880     | Sebring, Clifford J. .... Feb. 12, 1908     |
| Reed, Frank W. .... Mar. 15, 1909         | Sessions, Alfred A. .... May 23, 1906       |
| Reed, James P. .... Nov. 30, 1908         | Shaw, William S. .... Apr. 7, 1902          |
| Reeves, Frank. .... Nov. 17, 1909         | Shellenberger, George H. .... Jan. 18, 1908 |
| Reeves, Herbert. .... Oct. 8, 1910        | Sherwood, Edmund. .... Nov. 24, 1899        |
| *Reeves, W. T. .... Nov. 27, 1891         | Shetler, Daniel W. .... Dec. 6, 1904        |
| Reeves, Willis. .... June 27, 1906        | Shields, James W. .... Dec. 9, 1905         |
| *Regan, Willard A. .... May 17, 1897      | Shissler, William K. .... Sept. 6, 1909     |
| *Reid, James W. .... Apr. 17, 1891        | Shoup, Guy. .... Feb. 15, 1895              |
| *Reaser, Burt C. .... Nov. 12, 1901       | Shoup, Walter O. .... Dec. 29, 1904         |
| *Reynolds, James S. .... June 1, 1866     | †Shutter, George W. C. .... Dec. 1, 1892    |
| Rhea, Evert P. .... Dec. 9, 1904          | *Sidebotham, R. A. .... Jan. 25, 1875       |
| Rhea, George P. .... Dec. 3, 1900         | Sigmond, Lloyd E. .... May 3, 1909          |
| Rhodes, Dorsey L. .... Nov. 18, 1907      | Sims, O. .... June 7, 1866                  |
| Rice, John C. .... Feb. 16, 1891          | Sinclair, Bartlett. .... Dec. 18, 1899      |
| *Rich, Joseph C. .... Feb. 1, 1897        | Sinclair, J. O. .... Jan. 25, 1906          |
| Richards, J. H. .... Feb. 9, 1891         | Sloan, William C. .... Feb. 21, 1901        |
| Richards, Jesse L. .... Feb. 23, 1906     | Smead, John R. .... Feb. 2, 1909            |
| Richardson, Edmund F. .... Feb. 23, 1906  | Smiley, William H. .... Oct. 10, 1904       |
| Riebeling, Magnus G. .... Mar. 16, 1907   | Smith, Addison T. .... May 22, 1905         |
| Risser, Thor S. .... Feb. 7, 1910         | *Smith, Alanson. .... Jan. 13, 1873         |
| Rivers, John L. .... Apr. 21, 1897        | Smith, Frank J. .... Dec. 13, 1892          |
| Robb, Bamford A. .... Nov. 18, 1895       | *Smith, H. W. .... Jan. 23, 1884            |
| Robbins, William A. .... Sept. 9, 1909    | Smith, I. N. .... June 1, 1866              |
| Roberts, Claude H. .... Feb. 14, 1901     | Smith, Isham N. .... Mar. 19, 1895          |
| Roberts, George H. .... Jan. 25, 1886     | Smith, J. Ed. .... Jan. 19, 1906            |
| Roberts, Owen F. .... May 21, 1900        | *Smith, Ransford. .... Jan. 23, 1888        |
| Robertson, Frederick C. .... May 31, 1899 | Smith, Rial M. .... Mar. 14, 1910           |
| Robertson, George B. .... Sept. 11, 1882  | Smith, William. .... Apr. 3, 1901           |
| Robinson, William A. .... Dec. 29, 1905   | Smock, P. Monroe. .... May 9, 1910          |
|                                           | Snell, Marshall K. .... Nov. 18, 1907       |

‡Disbarred, Dec. 17, 1892.



| Date Admitted.                        | Date Admitted.                       |
|---------------------------------------|--------------------------------------|
| Snow, Edwin A.....Dec. 9, 1904        | Thomas, Della M.....Dec. 24, 1907    |
| Snyder, Wilson I.....June 6, 1907     | Thomas, Harvey A.....Dec. 14, 1907   |
| Soule, Orson Pratt....Jan. 18, 1904   | Thomas, Richard D....Nov. 17, 1909   |
| Spence, Robert S.....Jan. 19, 1887    | Thomas, Troy W.....June 1, 1901      |
| St. Clair, Charles C....Jan. 25, 1909 | Thompson, James M....Feb. 5, 1901    |
| St. Clair, Clency.....Jan. 5, 1904    | Thompson, Walter B....Sept. 20, 1910 |
| Stafford, Wesley T....Apr. 27, 1910   | Tiffany, Fred L.....Mar. 15, 1909    |
| Standrod, Drew W.....Apr. 8, 1895     | Tillinghast, Philip....Jan. 27, 1890 |
| Steeg, van de, George H.              | Tipton, S. L.....Sept. 8, 1891       |
| .....May 10, 1910                     | Torrance, John A.....Feb. 18, 1891   |
| Steele, Edgar C.....Oct. 22, 1895     | Towles, Therrett.....Apr. 5, 1909    |
| Steinlein, John A.....Oct. 2, 1906    | Travis, William J.....Apr. 8, 1910   |
| Stephens, Henson M....Mar. 19, 1908   | Traitt, Warren.....Apr. 19, 1897     |
| Stern, Samuel R.....Mar. 28, 1905     | Turner, George.....June 20, 1905     |
| Stevens, James M.....Dec. 22, 1897    | Tweedy, Benjamin F....Oct. 1, 1900   |
| *Stevenson, Charles C..Jan. 16, 1886  | Tyer, Henry W.....May 22, 1905       |
| Stewart, Barnard J....May 19, 1908    |                                      |
| Stewart, George H....Feb. 9, 1891     | Urdahl, Hans.....Jan. 31, 1900       |
| Stewart, J. Z., Jr.....July 5, 1907   |                                      |
| Stewart, T. M.....Feb. 28, 1891       | Varian, Bertram S.....Jan. 9, 1899   |
| Stickney, Charles W....Jan. 25, 1899  | Varian, Charles S.....Jan. 27, 1886  |
| Stillinger, William E...Apr. 17, 1900 | Van Dryn, Owen M....Sept. 4, 1900    |
| Stinson, James A.....Mar. 19, 1910    | Van Velson, Arthur E..Nov. 19, 1900  |
| Stobbs, Frank L.....Nov. 9, 1909      | Vineyard, Lycurgus...Jan. 28, 1884   |
| Stockslager, Charles O.Apr. 20, 1894  | Vollmer, Joseph G....Oct. 19, 1908   |
| Stoll, William T.....Apr. 18, 1891    | Voorhees, Charles F....Mar. 15, 1910 |
| Stone, Alfred F.....Sept. 22, 1910    | Voorhees, Charles S...Mar. 16, 1908  |
| Stone, C. F.....Nov. 19, 1891         |                                      |
| Stone, Oscar C.....Dec. 31, 1909      | Wagner, Clare C.....Oct. 21, 1901    |
| Stone, William A.....Jan. 14, 1902    | Waite, C. B.....June 7, 1886         |
| Stokey, P. E.....Mar. 24, 1906        | Walker, Ray D.....Apr. 16, 1906      |
| Stout, James.....Jan. 14, 1878        | Wallace, Harry E.....Jan. 30, 1901   |
| Stoutemeyer, Bernard E.Dec. 6, 1904   | Wallace, W. M.....Jan. 18, 1892      |
| *Stull, Homer.....Feb. 2, 1884        | Wallis, James H.....May 28, 1900     |
| Sullivan, Isaac N....Jan. 22, 1889    | Walsh, C. J.....Jan. 26, 1884        |
| Sullivan, John C.....Dec. 9, 1904     | Walters, Edward A....Dec. 9, 1899    |
| Sullivan, LaVerne L...Nov. 22, 1898   | Walters, T. A.....Mar. 12, 1907      |
| Sullivan, Willis E.....Dec. 7, 1901   | Warner, Clarence A...Feb. 8, 1898    |
| Sunderlin, Charles A...May 8, 1909    | Warner, Loren A.....Dec. 18, 1909    |
| Sundmacher, Charles H.Aug. 9, 1899    | *Waters, G. L.....Jan. 12, 1885      |
| Suppiger, George W....Oct. 1, 1900    | Waters, Julius S.....Jan. 14, 1897   |
| Sutphen, Doran H....Apr. 12, 1909     | Watson, Ephraim H...Jan. 18, 1904    |
| Sutphen, Percy T.....Mar. 9, 1909     | Watts, James G.....Apr. 8, 1898      |
| Sweeley, Marlin J.....Jan. 9, 1907    | Wayne, James A.....Oct. 17, 1908     |
| Sweeney, Patrick W...May 22, 1905     | Wearne, Roger G.....Oct. 11, 1904    |
| Sweet, Augustus C....Mar. 21, 1896    | Weaver, John L.....Feb. 21, 1900     |
| Sweet, Willis.....Jan. 30, 1889       | Weldy, Seth.....Jan. 9, 1868         |
| Sykes, M'Cready....June 16, 1909      | Wernette, Nicodemus D.Mar. 15, 1909  |
|                                       | West, John B.....Mar. 28, 1905       |
| Tannahill, George W...Oct. 7, 1897    | West, Taylor B.....Mar. 26, 1907     |
| Tannahill, Samuel O...Oct. 17, 1905   | Wester, Howard W....May 10, 1910     |
| Tanner, Nathan, Jr....June 22, 1903   | Wester, John R.....Feb. 20, 1895     |
| *Tate, Miles W.....Nov. 18, 1896      | Wetoch, Frank S.....June 1, 1905     |
| Taylor, Berle E.....Jan. 23, 1909     | Wheelan, Edmund W...Apr. 6, 1908     |
| Taylor, Hampton.....Oct. 1, 1900      | Whitcomb, Enoch W...Jan. 8, 1907     |
| Taylor, Herman H....Feb. 1, 1905      | White, Ellis T.....Apr. 17, 1899     |
| Tennyson, Luther W....Dec. 1, 1906    | White, John W.....Nov. 8, 1909       |
| Terrell, Robert M....Apr. 26, 1909    | White, Wallace R....Sept. 5, 1881    |
| Terrell, Thomas F....Nov. 29, 1892    | Whitehead, Andrew...Jan. 26, 1884    |

|                        | Date Admitted. |                         | Date Admitted. |
|------------------------|----------------|-------------------------|----------------|
| Whitla, Ezra R.....    | Oct. 14, 1904  | Witty, William H.....   | Sept. 8, 1908  |
| Whitney, Monroe G....  | Oct. 19, 1908  | Wixom, Justin H.....    | Mar. 20, 1905  |
| Whittier, E. S.....    | Feb. 15, 1889  | Wolfe, Edmund M....     | Nov. 21, 1898  |
| Whitsell, Leon O.....  | Apr. 10, 1907  | Wolfe, Guy W.....       | Apr. 17, 1900  |
| Wilcox, Rex V.....     | Feb. 2, 1909   | *Wood, Charles A.....   | Jan. 28, 1884  |
| Wilkins, William H.... | May 22, 1908   | Wood, Fremont.....      | Sept. 18, 1881 |
| Williams, David D....  | Nov. 18, 1898  | Woods, Omer B.....      | May 12, 1908   |
| Williams, Edwin H....  | Oct. 26, 1908  | Woods, William W....    | Jan. 12, 1887  |
| Williams, John E.....  | Apr. 8, 1909   | Workman, Louis E....    | Apr. 8, 1898   |
| Williams, P. L.....    | Sept. 18, 1880 | Worstell, Harrold E...  | July 6, 1907   |
| Williamson, Pliny W... | May 21, 1900   | Worstell, Lawrence E... | Oct. 10, 1905  |
| *Willson, Benjamin.... | Jan. 18, 1878  | Worth, Daniel.....      | Mar. 26, 1894  |
| Wilson, B. S.....      | Feb. 12, 1907  | Worthman, Harry S....   | Dec. 5, 1892   |
| Wilson, Edgar.....     | Jan. 21, 1885  | Wourms, John H.....     | Aug. 9, 1905   |
| Wilson, James G.....   | Apr. 27, 1909  | Wyman, Frank T.....     | Jan. 17, 1890  |
| Wilson, Robert B....   | May, 14, 1900  | *Wyman, George H....    | Mar. 7, 1891   |
| Wilson, Thomas H....   | Nov. 16, 1898  | Wyman, Harry C....      | Feb. 9, 1891   |
| Winfree, William H...  | Mar. 19, 1895  |                         |                |
| Wing, Herbert.....     | Feb. 11, 1909  | Young, David L.....     | Mar. 28, 1908  |
| Winstead, Charles E... | Oct. 28, 1909  | Young, Helen L.....     | Oct. 26, 1895  |
| Winston, Alex. M.....  | Oct. 6, 1902   | *Young, Frank J.....    | Oct. 1, 1900   |
| *Winston, Patrick H... | Jan. 25, 1888  | Young, Richard W....    | Dec. 10, 1908  |
| Winter, Floyd D.....   | Oct. 8, 1908   |                         |                |
| Winters, S. C.....     | Jan. 28, 1892  | Zane, John M.....       | Nov. 9, 1896   |
| Wise, James H.....     | Feb. 6, 1909   | Zent, Daniel W.....     | Mar. 9, 1909   |
| Witherspoon, A. W...   | Mar. 18, 1907  | Zimmerman, George F..   | May 28, 1904   |



**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF IDAHO.**

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(March 11, 1910.)

**IDAHO FRUIT LAND CO., LTD., Appellant, v. GREAT  
WESTERN BEET SUGAR CO. and ELMORE  
COUNTY IRRIGATED FARMS ASSOCIATION, Re-  
spondents.**

[107 Pac. 989.]

**WRITTEN CONTRACT—BEST EVIDENCE—PRE-CONTRACT STATEMENTS—PER-  
PETUAL WATER RIGHTS—RIGHTS OF WATER USER—SUFFICIENCY OF  
EVIDENCE.**

(Syllabus by the court.)

1. It was not error for the trial court to sustain a motion to strike out evidence of the contents, character and nature of a written contract, where the contract itself was not produced and it appeared that it was in existence and could have been produced. The writing itself was the best evidence of its contents and the rights conferred thereunder.

2. A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by the company issuing the prospectus, standing alone, is not sufficient upon which to found a cause of action. Where the action is based on a written contract entered into in pursuance of the statements contained in such prospectus, the presumption is that the entire contract was embodied in the writing.

3. A purchase of a perpetual water right from an irrigation company, with the right to receive the water so purchased from the company's canal, carries with it such a right in the appropriation itself and such an easement or servitude in the canal system as to authorize and enable the purchaser himself to go upon the property and protect the appropriation and maintain the diversion, and repair the canal, and carry the water through the

Argument for Appellant.

canal system to the extent of the purchaser's water right, in the event the company fails, neglects or refuses to do so.

4. A legal distinction exists and should be maintained between the absolute fee, title and ownership of property itself and those contractual rights which arise out of mutual consent and give a contracting party certain claims, easements or servitudes in and to the property, and which by their very nature impress themselves upon the property itself, either for a time or perpetually.

5. Evidence in this case examined, and held sufficient to support the findings and judgment.

APPEAL from the District Court of the Fourth Judicial District, in and for the County of Elmore. Hon. E. A. Walters, Judge.

Action by plaintiff praying for a decree adjudging it, together with a number of individuals in whose behalf, it sues, to be the legal owners of the irrigation system described in the complaint. Judgment for the defendants, and the plaintiff appeals. *Affirmed.*

J. G. Watts, and Wyman & Wyman, for Appellant.

This court has held that where the consideration has been paid, the contract may be enforced independent of a written contract. (*Deeds v. Stephens*, 8 Ida. 514, 69 Pac. 534; *Stowell v. Tucker*, 7 Ida. 312, 62 Pac. 1033; *Barton v. Dunlap*, 8 Ida. 82, 66 Pac. 832; Rev. Codes, sec. 6008.)

A perpetual water right is more than a mere right to the use of water; it is a grant of an interest in the original appropriation, and an easement through the reservoir and canals built to store and conduct it to lands where it is to be used.

In nearly every adjudicated case, the courts have held that the consumer's interest is a real property interest. (*Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 36 Am. St. 280, 33 Pac. 144; *Gould v. Maricopa Canal Co.* (Ariz.), 76 Pac. 598; *Salt River Valley Canal Co. v. Nelson*, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A., N. S., 711; *Wiel on Water Rights*, 2d ed., p. 641; *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81.)

## Opinion of the Court—Ailshie, J.

E. M. Wolfe, for Respondent, Elmore County Irrigated Farms Assn.

This court has frequently held that the company which supplies the water user is the appropriator of the water while he is the user of the water. The appropriation belongs to the water company; the right to use that appropriation belongs to the water user.

The obligations of the company are fixed by the constitution and the statutes of this state, and are entirely distinct from the obligations and rights of the water user.

The duty of the corporation is a public or quasi-public duty. The right and duty of the water user is a private right and personal duty. The corporation cannot shift it or avoid its duty without forfeiture of its franchise. (*Wilterding v. Green*, 4 Ida. 73, 45 Pac. 134; *Farmers' etc. Co. v. Riverside etc. Irr. Dist.*, 14 Ida. 450, 94 Pac. 761; *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81, and cases cited in these decisions.)

W. C. Howie, and Cavanah & Blake, for Respondent, the Great Western Beet Sugar Company.

It has been universally held that the payment of the consideration alone upon an oral contract for an interest in lands is not sufficient part performance to take it out of the statute of frauds. (20 Cyc. P. & P. (N. Y.) 783; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783; *Goddard v. Donaha*, 42 Kan. 754, 22 Pac. 708.)

AILSHIE, J.—This action was instituted by the appellant, the Idaho Fruit Land Co., Ltd., for itself as the owner of a tract of land and on behalf of "about 300 who own lands aggregating in all about 40,000 acres . . . in Elmore county, Idaho," alleging "that all of the owners of said lands are owners of water rights entitling them to the use of water from the irrigation system hereinafter described, and are the joint owners of said system, and that this plaintiff sues in his own behalf and in behalf of owners of all of said lands and water

rights and of said irrigation system.” The plaintiff prayed for a decree declaring the irrigation system described in the complaint to be the property of the plaintiff, and other parties in whose behalf plaintiff prosecuted the action, and further decreeing that the Great Western Beet Sugar Company, one of the respondents herein, has no further interest in the property or irrigation system. The complaint also asks for the appointment of a receiver, *pendente lite*, to take charge of, and repair and operate the irrigation system during the pendency of the action. A receiver was accordingly appointed, and an appeal was taken from the action of the trial court in making such appointment, and the action of the lower court was affirmed by this court. (*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 17 Ida. 273, 105 Pac. 562.) The case was subsequently tried on its merits, and findings and judgment were made and entered in favor of the defendants and denying the plaintiff the relief demanded. This appeal is from the judgment.

The brief of appellant contains no assignment or specification of errors, and we are accordingly left to an examination of the arguments and the record in the case without anything very definite as to a specific error upon which appellant assails the judgment or relies for a reversal thereof. We shall consider the matters, however, that are dealt with in the brief and argument of appellant.

The appellant alleged, and now contends, that it has proven that its contract and the contracts of all the other water users under the Great Western Beet Sugar Co.’s canal provided in terms that when the system should be completed and all the water rights sold and paid for that the system was capable of supplying, the canal, reservoirs and entire property should at once become the property of the water right holders. It also insists that the system has been completed so far as the Great Western Beet Sugar Co. is able to complete it, and that the company is now insolvent and unable to proceed further or meet its outstanding obligations, and that it has sold water rights far in excess of the capacity of the system, and that in addition to becoming hopelessly insolvent it has lost all fur-

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Opinion of the Court—Ailshie, J.

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ther interest in maintaining, improving or operating the system.

The appellant also maintains, as a second proposition, that the Great Western Beet Sugar Co., which we shall hereafter designate as the "Great Western," has sold perpetual water rights, and that such a water right is more than a mere right to the use of the water but amounts to a grant of an interest in the original appropriation and irrigation system, and that the moment the Great Western has sold such rights in excess of the capacity of its irrigation system the entire system at once became the property of the purchasers of such perpetual water rights. When the plaintiff in the lower court undertook to prove its right in this property and the rights of the 300 water users, in whose behalf it claims to have instituted this action, it did not introduce or offer to introduce its deed or contract in evidence, nor did it introduce or offer to introduce the deed or contract held by any water user which had been entered into between the water user and the Great Western. In course of the trial, however, the plaintiff attempted to prove by water right claimants the nature and character of their contracts with the Great Western. The court at first overruled objections to this class of evidence, but on cross-examination it developed that their contracts or deeds were all in writing, and the objections were thereupon renewed and motions were made to strike the evidence as to the nature and contents of the contracts from the record on the ground, first, that a water right is real property and must be conveyed by deed, and, second, that the deeds or writings themselves were the best evidence and that secondary evidence thereof should not be admitted. These motions were sustained. The ruling of the court was clearly correct.

In our judgment, as we view the whole record in this case, the final decision of the trial court turned upon the fact that there was no competent evidence in the case to show just what the plaintiff's contract was or what rights it has acquired in this canal system, or the waters therefrom, by reason and virtue of its contract with the Great Western. It clearly appears that the contracts upon which the plaintiff sought to



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Opinion of the Court—Ailshie, J.

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recover had been reduced to writing, and they were consequently the best evidence of the extent, terms and nature of the contract. They appear to have been deeds to perpetual water rights for which each land owner had paid a large sum, and judging from the nature of the evidence and the arguments in the briefs we infer that those deeds specifically provided that the land owner should never be required to pay any water rates for the use of water from this canal system, and that the only charge to which they should ever be subjected would be that of meeting their proportionate share of the maintenance expense. This is inference, however, and is not established by any legitimate evidence in the case. Counsel for appellant seems to have insisted in the lower court, and so insists here, that he was "not trying the right of individual users." It was stated by counsel in the lower court that, "the phase we are trying now of the contract is community interest. This system never did belong to the Great Western Beet Sugar Co." And so it is contended here, by counsel, that the question he has been litigating and is now presenting to the court is "a community interest of the water right holders and not the individual rights, as evidenced by each one's deed to the water right to irrigate his own particular land." This proposition is rather vague and obscure. If it is proposed to show a community interest and recover on that theory, that interest must necessarily be limited to those who have in some manner contracted with the company, or else who have by reason of being members of the community acquired by operation of law some interest in the property. But it is not argued by counsel for appellant that the plaintiff and the parties for whom it sues are interested in this water system merely by reason of being members of the community at large, but rather by reason of having a contractual relation with the Great Western. In support of this position, counsel introduced in evidence a prospectus issued by the Great Western prior to the sale of any of these water rights in which it is stated:

"The Great Western Beet Sugar Company sells perpetual water rights to land under completed ditches at from \$20.00

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to \$30.00 per acre and the best of land is to be obtained within a radius of from four to ten miles of Mountain Home. Good terms of payments are made by the company for perpetual water rights. When a settler purchases a perpetual water right as above stated there are no further fixed charges for maintenance made by the company, for when the canals are completed and all the water rights have been sold, the entire reservoir and canal system then becomes the property of the actual settlers and will afterward be operated by the water users. A perpetual water right carries with it the right to demand and receive annually, perpetually and continuously, during the irrigation season, a sufficient amount of water to keep the said land properly irrigated."

This statement constituted a representation on the part of the Great Western as to the contracts it proposed to enter into with water users, but it was not a contract and, standing alone, cannot afford a basis for this action. The prospective water users, moved by the statements and representations contained in this prospectus, sought contracts with the company that made these statements, and entered into contracts in writing, and their rights under the contracts so made must be measured by the contracts themselves. It must be remembered in this connection that this is an action based on contracts, and does not pretend to be founded on fraud. It is not claimed that there was any fraud in the making of the contracts. Whatever previous material representations or agreements may have been made between the contracting parties are presumed to have been embodied in the final written contract. (*Jacobs v. Shenon*, 3 Ida. 274, 29 Pac. 44; *Tyson v. Neill*, 8 Ida. 607, 70 Pac. 790.) In order, therefore, for the court to construe the contract and properly determine the rights of the parties under its terms and import, it is necessary for the contract to be before the court or its contents to be disclosed in a proper and legal manner. This evidence was followed by the introduction of a petition in insolvency filed by the Great Western in which it admitted the existence of these water contracts, and that contracts had been sold to the full capacity of the canal and that the system is no longer

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a practical asset of the company as a means of raising revenue or deriving profit. This, however, does not relieve the situation as to the contracts themselves.

So far as the ultimate rights and advantages of the water users are concerned, it seems to us that it will make very little difference whether they be adjudged to own the absolute fee and title to this irrigation system, or be left to rely upon the rights and privileges they acquire under their contracts for perpetual water rights. In either event, they are individually liable for their *pro rata* share of maintenance expense for keeping the system in repair and delivering water. On the other hand, their perpetual water rights give them such an interest in the irrigation system, the ditches, canals, reservoirs and water rights as to enable them to go upon the property and maintain the same and keep it in repair and deliver the water to which they are respectively entitled in the event the company fails or neglects to do so. In a case like this where there are several hundred interested parties, it will be necessary for them to act jointly or through a properly constituted or appointed agent or representative.

This court recently had occasion to consider the rights of a water user who had purchased a perpetual water right from a canal company. (*Nampa & Meridian Irr. Dist. v. Gess*, 17 Ida. 552, 106 Pac. 993.) After supposing the case of a canal owner or ditch company that had sold water rights to the extent of the full capacity of the canal, the court said:

“In such event he would no longer be interested in keeping up the canal or delivering the water, and yet if all the purchasers should construe their conveyances the same as the respondent here construes his deed, there would be no one to keep the canal in repair and bear the expense of maintenance and delivery of water. On the other hand, we have no doubt but that Rossi acquired his right and interest in the appropriation of the volume of water from the Boise river which was carried through the Ridenbaugh canal and that he might, at any time the majority owners of the canal failed or neglected to protect the appropriation and keep the canal in repair, go himself upon the property, protect the appropriation,

## Opinion of the Court—Ailshie, J.

and maintain the diversion and carry the water through the canal to the extent of the quantity necessary for the irrigation of his tract of land." For authorities indicating a similar view, see *Knowles v. New Sweden Irr. Dist.*, 16 Ida. 217, 101 Pac. 81 (original opinion); *Hard v. Boise City Irr. & Land Co.*, 9 Ida. 589, 76 Pac. 331, 65 L. R. A. 407; Wiel on Water Rights, 2d ed., p. 641.

On the record before us and the state of facts it discloses, we would not be justified in considering or passing on the question of the appellant's ultimate rights in the irrigation system, constructed and operated by the Great Western. We are not unmindful of the distinction, as a legal proposition, that should and must be recognized and maintained between the absolute title and ownership of property itself and those contractual rights which arise out of mutual consent and give a contracting party certain privileges, easements or servitudes in and to the property of another, and which by their very nature impress themselves upon the property, either for a time or perpetually. In some cases, and this may be one of such cases, the practical and working effect may be and amount to the same whether the right be one or the other as above indicated.

The rights claimed by plaintiff against the Elmore County Irrigated Farms Association are founded not upon contract direct with that company, but by reason of the contracts with the Great Western, which latter company held a lease or contract from the Irrigated Farms Association. A different question arises in the issue thus presented, but requires no consideration here for the reason there is no recovery against the Great Western with which the contract was made.

In this case we think the condition of the pleadings worthy of note. The plaintiff does not disclose the names of all the claimants in whose behalf it sues, nor does it describe all the lands it is claimed are involved in and affected by this so-called community of interest. It must be apparent upon a moment's reflection that a decree quieting titles in these several claimants should designate the several parties interested and the extent of such interest so that a decree, if obtained

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Opinion of the Court—Sullivan, C. J., Concurring.

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as prayed, may vest the legal title in the true owners to the extent only to which each is entitled; and thus prevent future litigation among the parties themselves in order to determine the extent of the right of each. It would be difficult for a decree to run in favor of undisclosed plaintiffs. It is apparent that the decree in this case in no way adjudicates the rights of the parties under their contracts with the Great Western for perpetual water rights or whatever those contracts may cover. The trial court, not having those contracts before it, could not make findings or enter any decree determining or adjudicating any rights under them. Anything in the decree entered in this case which might be so construed should be disregarded, and must be treated as modified to that extent.

For the reasons hereinbefore stated, the judgment must be affirmed, except as to the modification above indicated, and it is so ordered. Costs in favor of respondents.

Stewart, J., concurs.

SULLIVAN, C. J., Concurring.—I concur in the conclusion reached but I do not think that the rule of law laid down in the second subdivision of the syllabus has any application to this case, for the reason that this case is not based upon the water deed referred to in said syllabus as the written contract. From the allegations of the complaint it clearly appears that the action is not based entirely upon a water right deed, but upon the contract of the Great Western Co., to the effect that when it had sold the water rights to the extent of the appropriation and capacity of its system and the system was completed and paid for, it should become the property of those who had purchased such water rights, the giving of the water deed being only a part performance of the contract and not the contract itself, but only a part of it. Hence the action was not based upon the deed for the water right. The prospectus was only a part of the evidence offered in support of the allegations of the complaint, as numerous agents of the Great Western Co. who sold water rights for it

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Argument for Appellant.

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testified that the sales were made upon the condition that when the water rights were all sold, the purchasers of such rights should become the absolute owners of the reservoir and water system.

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(October 30, 1909.)

W. H. BEST, Respondent, v. J. W. BROADHEAD, Appellant.

[108 Pac. 333.]

CONSTRUCTION OF STATUTE—ORDINANCES—POWER OF VILLAGES TO MAKE  
—HORSES RUNNING AT LARGE.

(Syllabus by the court.)

1. Under the provisions of subdiv. 15 of sec. 15 of an act of the legislature providing for the organization, government and powers of cities and villages (see Sess. Laws 1905, p. 113), the cities and villages of the state have power and authority to pass ordinances to prevent the running at large of horses within corporate limits.

2. *Held*, that the court erred in not admitting all evidence offered tending to establish the defense set up in the answer.

3. *Held*, that the phrase "other animals" as used in said section is broad enough to and does include horses and all other animals.

APPEAL from the District Court of the First Judicial District (now the Eighth) for Kootenai County. Hon. W. W. Woods, Judge.

Action to recover damages for animals alleged to have been appropriated by the defendant. Judgment for the plaintiff. *Reversed*.

Ezra R. Whitla, for Appellant.

The court must either say that the legislature by adding the words "other animals" did not mean what it said and

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Opinion of the Court—Sullivan, C. J.

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added superfluous words, or these words must be construed in their ordinary meaning. (Sec. 15, Rev. Codes; *Henderson v. Wabash etc. Ry. Co.*, 81 Mo. 605; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 22 L. ed. 560; *Waters v. People*, 23 Colo. 33, 58 Am. St. 215, 46 Pac. 112, 33 L. R. A. 836; *Commonwealth v. Turner*, 145 Mass. 296, 14 N. E. 130; *Reiche v. Smythe*, 13 Wall. 163, 20 L. ed. 566; *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 495, 44 L. R. A. 449, 23 S. E. 935; *Richardson v. Duncan*, 2 Heisk. (49 Tenn.) 200.)

Under the general welfare clause such as shown in this statute the city had authority, without any other express statutory provision, to take up and impound animals running at large within the city, as it has been deemed that this was necessary in preserving the peace, good government and welfare of the corporation. (2 Cyc. 437; *Cockrane v. Mayor of Frostburg*, 81 Md. 54, 48 Am. St. 479, 31 Atl. 703, 27 L. R. A. 728; *Commonwealth v. Curtis*, 9 Allen (Mass.), 266; 28 Cyc. 739, 761; *Carson v. City of Genessee*, 9 Ida. 244, 108 Am. St. 127, 74 Pac. 862; *Village of Sandpoint v. Doyle*, 11 Ida. 642, 83 Pac. 598, 4 L. R. A., N. S., 810; *Mayor etc. v. Norman*, 92 Tenn. 73, 20 S. W. 417; *Commonwealth v. Bean*, 14 Gray (Mass.), 53; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686.)

R. E. McFarland, for Respondent.

The authority cited by counsel in support of his contention that the words "and other animals" included horses is not applicable to this case, because the statutes which they construed are not statutes of the character of the one involved herein, and were not enacted for that purpose. (Black, Int. of Laws, 141; Sutherland, Stat. Const., 268.)

SULLIVAN, C. J.—This action was commenced to recover from the defendant the value of two mares with their sucking colts and one bay mare about two years old, alleged to have been wrongfully taken by the defendant from the plaintiff and converted to his own use, and for damages for their detention and \$100 attorney's fee for prosecuting the action.

•The defendant by his answer denied the allegations of the

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Opinion of the Court—Sullivan, C. J.

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complaint and as an affirmative defense averred that he was poundmaster of the village of Post Falls, Kootenai county, and that said village had by an ordinance duly enacted, provided for impounding and selling horses running at large, and on the 8th day of May, 1906, while said ordinance was in full force and effect, the defendant, as poundmaster and acting under said ordinance, took up and impounded said horses and colts, and alleges that the ordinance was complied with in all respects, and that thereafter the animals were sold by the village marshal of the village of Post Falls, and that at such sale, which was by public auction, the defendant purchased the two year old mare, also one mare with her sucking colt, and alleges that this was the way and none other in which he had said animals, and asked for judgment upon that state of facts. The ordinances under which the defendant claimed to be acting as poundmaster were set out and made a part of the answer.

Upon the issues thus made the cause was tried by the court with a jury, and verdict and judgment rendered and entered for the plaintiff for \$375 damages and costs of suit.

A motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

On the trial the court excluded the ordinances of the village of Post Falls providing for impounding horses and other animals which were found running loose in the village. The court held that under the provisions of subd. 15, sec. 15, of an act to amend sec. 73 of an act entitled, "An act to provide for the organization, government and powers of cities and villages," etc., Sess. Laws 1905, p. 113, that no authority was given to a city or village to pass ordinances for the purpose of impounding stray horses, and held that said statute enumerated certain animals, and that such animals excluded all animals not therein named, regardless of the general clause of said section providing for the regulation of running at large of "other animals," after enumerating cattle, hogs, mules, sheep, goats and dogs. Thus holding, the court would not permit the defendant to introduce in evidence the ordinance of said village providing for the impounding of horses



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Opinion of the Court—Sullivan, C. J.

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and other animals, and thus shut out entirely the defense pleaded by the defendant to the effect that said horses were taken by the poundmaster when running loose in the village of Post Falls and impounded and sold under the provisions of said ordinance.

While there are a number of assignments of error going to the admission and rejection of evidence, they substantially all rested upon the proposition that they were immaterial for the reason that said village had no authority whatever to pass an ordinance to prevent the running at large of horses in said village, and for that reason horses could not be impounded under said ordinance. In support of this decision, counsel for appellant cites from the act concerning cities and villages found in the Laws of 1899 at page 204, Laws of 1901, p. 100, and Laws of 1903, p. 222, the provision authorizing villages to pass ordinances regulating the running at large of animals. Each and every one contains, among other animals named, "horses," but that that provision was amended by the Laws of 1905 and the word "horses" was omitted and said provision made to read as follows:

"Regulate the running at large of cattle, hogs, mules, sheep, goats, dogs and other animals and to cause such as may be running at large to be impounded and sold to discharge the cost and penalties provided for the violation of such prohibition, and the expense of impounding and keeping the same, and of such sale."

And it is contended that whatever the purpose of the legislature was in omitting the word "horses" from said section, it is not open to discussion, and that it was evident the legislature may have come to the conclusion that the running at large of horses ought to be permitted, while hogs, mules, sheep, goats and other animals should not be permitted to run at large, and for that reason the court did not err in refusing to admit said ordinance in evidence. In support of that contention Black on Interpretation of Laws, p. 141, and Sutherland on Statutory Construction, sec. 268, are cited.

The trial court evidently took the position that although former statutes in regard to cities and villages regulating ani-

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Opinion of the Court—Sullivan, C. J.

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mals running at large contained among other animals enumerated "horses," that because of its omission in the statute as amended by the Laws of 1905, it was the purpose and intent of the legislature to prohibit cities and villages from regulating the running at large of horses, and that "other animals," as used in said section, did not include horses.

We find on an examination of the Session Laws of 1907 that the legislature, in amending said act in regard to cities and villages, inserted the word "horses" in said section 15, and made said section read the same as it did prior to its amendment in 1905.

It is clearly evident that the word "horses" was left out of the act of 1905 by mistake or carelessness, as there could be no reason why mules should be prevented from running at large in a village and horses be permitted to do so, and we conclude that the words "other animals," as used in said section in the act of 1905 is broad enough to and does include horses and was intended to include all other animals not specially enumerated. The rules of interpretation as stated in Black and Sutherland are useful as a guide in determining the probable intention of the legislature, but if it should be apparent in any particular case that the legislature did not in fact intend that its express mention of one thing should operate as an exclusion of all others, then the maxim, "*Expressio unius est exclusio alterius*," must give way. We are clearly of the opinion that cities and villages have the power by proper ordinance to regulate the running at large of horses, and the court erred in holding that the village of Post Falls had no authority under the Laws of 1905 to regulate the running at large of horses within the limits of such village.

In our view of the case, it is not necessary for us to pass upon all of the other assignments of error, for they all revolve around the action of the court in holding that the village had no authority to enact said ordinance. The answer of the defendant pleads a complete defense to this action, and the court should have admitted all pertinent and relevant evidence which tended to establish that defense, and on a re-

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Points Decided.

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trial ordinances and all other evidence offered tending to establish that defense ought to be admitted.

The judgment of the court must be reversed and the cause remanded for a new trial, and it is so ordered, with costs in favor of appellant.

Stewart and Ailshie, JJ., concur.

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ON REHEARING.

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(April 19, 1910.)

(Syllabus by the court.)

1. Under the provisions of sec. 2276, Rev. Codes, an ordinance must contain no subject which shall not be clearly expressed in its title.

2. The title of an ordinance, "An act relating to domestic animals and prohibiting their running at large," is sufficient to authorize the incorporation in such ordinance of provisions incident to and regulating animals running at large, such as naming the kind, the territory or place in which they shall not run at large, the impounding and sale, the fees to be collected, and the penalty. It is sufficient if the title in its general scope clearly expresses the objects and purposes of the ordinance.

3. Sec. 2274, Rev. Codes, providing, "The style of all ordinances shall be: 'Be it ordained by the mayor and council of the city of ——— or the chairman and board of trustees of the village of ———,'" is directory, and the enacting clause of a village ordinance as follows: "Be it ordained by the town of Post Falls," is sufficient, as such enacting clause indicates the intention and declaration of the village to legislate.

4. Under the provisions of sec. 2276, Rev. Codes, "no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Under this provision of the statute, an amendatory ordinance which purports to amend an ordinance by inserting therein particular language without indicating where such insertion shall be made, or containing the entire ordinance as amended, or the particular section amended, is void.

5. Where the provisions of an amendatory ordinance are illegal and void, and it is apparent that such amendment is to

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Argument for Appellant.

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be substituted for the ordinance repealed, or for a particular part thereof, the illegal and void character of the repealing ordinance will also render void the repealing clause.

Ezra R. Whitla, for Appellant.

"The object and purpose of the title is to show the general character of the ordinance, so that anyone may not be misled thereby." (*State v. Calloway*, 11 Ida. 719, 114 Am. St. 285, 84 Pac. 27, 4 L. R. A., N. S., 109; *Village of St. Anthony v. Brandon*, 10 Ida. 205, 77 Pac. 322; *Pioneer Irr. Dist. v. Bradley*, 8 Ida. 310, 101 Am. St. 201, 68 Pac. 295; 28 Cyc. 379; *State v. Nebraska Telephone Co.*, 127 Iowa, 194, 103 N. W. 120.)

If the title of the ordinance does not mislead or deceive the people or the council as to the purpose or effect of the legislation or conceal or obscure the same, it is valid. (28 Cyc. 380; *Smith v. Emporia*, 27 Kan. 528; *Healy v. Johnson*, 127 Iowa, 221, 103 N. W. 92; *City of Des Moines v. Keller*, 116 Iowa, 648, 93 Am. St. 268, 88 N. W. 827, 57 L. R. A. 243; *City of Duluth v. Abrahamson*, 96 Minn. 39, 104 N. W. 682; *Thomson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328.)

An enacting clause is simply a formality and neither adds anything to, or detracts from, the validity of the ordinance in any way. (*Cape Girardeau v. Riley*, 52 Mo. 424, 14 Am. Rep. 428; *People ex rel. Town of Sterling v. Chipman*, 31 Colo. 90, 71 Pac. 1108; *City of Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. 678, 25 S. W. 202; *State ex rel. Dunlap v. Nohl*, 113 Wis. 15, 88 N. W. 1004; 1 Dillon, Mun. Corp., 4th ed., pp. 309-536, 538; 28 Cyc. 353.)

An amending ordinance need not contain the entire section amended, but only that provision thereof sought to be amended. (28 Cyc. 387; *Pentecost v. Stiles*, 5 Okl. 500, 49 Pac. 921; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Larkin v. Burlington C. R. & N. Ry. Co.*, 85 Iowa, 492, 52 N. W. 480.)

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R. E. McFarland, for Respondent.

The titles to Ordinances Nos. 36 and 40 are insufficient, null and void. (Laws 1899, p. 209, sec. 83; *Mo. Pac. Ry. Co. v. City of Wyandotte*, 44 Kan. 32, 23 Pac. 950; *State ex rel. Belt v. City of St. Louis*, 161 Mo. 371, 61 S. W. 658; *Town of Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. 753; *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. 745.)

The enacting clause of said Ordinance No. 40 is null and void. (Laws 1899, p. 200, sec. 59; *Galveston H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.), 36 S. W. 776.)

Ordinance No. 40 is not a valid ordinance because it does not comply with the laws of this state in reference to amending or repealing ordinances or sections of ordinances. (Laws 1899, p. 209, sec. 83; *Pentecost v. Stiles*, 5 Okl. 500, 49 Pac. 921; *O'Neill v. Tyler*, 3 N. D. 47, 53 N. W. 436; *Cascaden v. City of Waterloo*, 106 Iowa, 673, 77 N. W. 333; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. 558, 7 So. 885, 9 L. R. A. 69; McQuillan, Mun. Ordinances, par. 196.)

STEWART, J.—A rehearing was granted in this case and upon reargument it was contended by counsel for respondent that Ordinances Nos. 36 and 40, regulating the running at large of certain stock and providing for the impounding thereof in the town of Post Falls, were illegal and void. Certified copies of these ordinances were offered in evidence, and a number of specific objections to their introduction were made by counsel for respondent, and the trial court sustained the objection that the statute did not authorize such ordinances; and it was this question this court discussed and decided in the former opinion.

Counsel for respondent upon reargument urges very earnestly that this court should also determine the validity of the ordinances, for the reason that the cause having been reversed, the validity of such ordinances will necessarily arise upon a retrial of said case. Counsel for appellant, however, contends that the validity of such ordinances, because of their form, is not presented by the record. Strictly speaking, this

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contention is no doubt correct, but in view of the fact that a new trial has been ordered, and the validity of such ordinances will necessarily be involved, and counsel upon the re-argument having fully and exhaustively discussed the validity of such ordinances, we have concluded to express our views with reference to the same.

It is first contended that the title to Ordinance No. 36 is insufficient, because it does not express or contain the subject matter of said ordinance, and does not specify the penalty or punishment for a violation thereof, and does not refer to the provisions contained therein for the impounding and sale of the animals described, and does not describe the territory within which such animals are prohibited from running at large. The title reads as follows: "An act relating to domestic animals and prohibiting their running at large." Sec. 2276, Rev. Codes, provides: "Ordinances shall contain no subject which shall not be clearly expressed in their title." It is unnecessary in the title of an ordinance to index every particular provision contained therein. It is sufficient if the title in its general scope clearly expresses the object and purpose of such ordinance. When, therefore, the title provides that it is "An act relating to domestic animals and prohibiting their running at large," it is sufficient to authorize the incorporation therein of all provisions incident to the regulation and prohibition of animals running at large, such as naming the kind, the territory or place, the impounding and sale, the fees to be collected, and the penalty. We think this title sufficient. (*Village of St. Anthony v. Brandon*, 10 Ida. 205, 77 Pac. 322; *State v. Calloway*, 11 Ida. 719, 114 Am. St. 285, 84 Pac. 27, 4 L. R. A., N. S., 109; *Town of Bayard v. Baker*, 76 Iowa, 220, 40 N. W. 818; *McQuillan on Munic. Ordinances*, sec. 141; *Smith v. City of Emporia*, 27 Kan. 528.)

Secs. 1 and 10 of the ordinance clearly described the territory. It is true it does not say that the territory is within the town of Post Falls, yet the ordinance has reference only to the town of Post Falls and could not extend beyond its boundaries; and can only apply to the territory described and within the town. The territory is described as follows:

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“Limit of territory included in this ordinance commencing at a point where Sixty street intersects with the Spokane river, thence running in an easterly direction to Idaho street, thence running south to Spokane river, thence along the main or north channel to the place of beginning.” This is sufficient.

It is next contended that the enacting clause of the ordinance is not in the form provided by sec. 2274, Rev. Codes. This section provides: “The style of all ordinances shall be: ‘Be it ordained by the mayor and council of the city of \_\_\_\_\_ or the chairman and board of trustees of the village of \_\_\_\_\_.’” The enacting clause of Ordinance No. 36 reads as follows: “Be it ordained by the town of Post Falls.”

It will thus be seen that the enacting clause of Ordinance No. 36 is not in the language of the statute. The enacting clause of an ordinance, however, is merely a declaration of intention and purpose, and the enacting clause of Ordinance No. 36 clearly shows the intention and purpose of the town of Post Falls to enact such ordinance and that it was the town of Post Falls which enacted the same, and such appearing from the enacting clause is a sufficient compliance with the statute. The statute is directory only. (McQuillan on Munic. Ordinances, sec. 145; *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253; *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *People v. Chipman*, 31 Colo. 90, 71 Pac. 1108; 1 Dillon, Munic. Corp., 4th ed., sec. 309.) We think, therefore, that Ordinance No. 36 was a valid ordinance, and was in force at the time of the trial unless repealed by Ordinance No. 40.

It is contended that Ordinance No. 40 is invalid for the reason that the title does not express the object or purpose of the ordinance, because it does not state or provide that it is an ordinance amending Ordinance No. 36. The title reads as follows: “An ordinance establishing the boundary limits and making known the limit of territory included in Ordinance No. 36.” It thus appears that the object and purpose of this ordinance, as declared by the title, is to make some alteration or change in Ordinance No. 36, but the particular change as applied to any particular part of the ordinance is not dis-

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closed in the title. The title of an amendatory ordinance would be sufficient if it indicated the particular section or part of the ordinance to be amended without declaring in such title the general scope or purpose of the ordinance amended; and while it would have been better, no doubt, to have indicated the particular section of Ordinance No. 36 to be amended and to have stated such fact in the title, yet we are inclined to think that the title is sufficient to indicate the purpose and intent to amend Ordinance No. 36.

It is next contended that Ordinance No. 40 is invalid for the reason that it does not indicate that the territory described is within the village of Post Falls. This objection is not well taken. The village of Post Falls is legislating with reference to its own territory, and its ordinances include only territory within the village corporation, and it would appear useless to say that the ordinance is made applicable to the village of Post Falls.

It is next urged that the enacting clause of Ordinance No. 40 is void because not in proper form. What has been said with reference to the enacting clause of Ordinance No. 36 applies alike to the enacting clause of this ordinance. It is also urged that Ordinance No. 40 is void for the reason that it does not comply with sec. 2276, Rev. Codes. This section provides: "No ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Ordinance No. 40 in part is as follows: "An ordinance establishing the boundary limits and making known the limit of territory included in Ordinance No. 36.

"Be it ordained by the chairman of the board of trustees of the village of Post Falls.

"Commencing at a point where the artificial channel empties into Spokane river, thence in a northeasterly direction to a point where Sixty street intersects with the N. P. R. R. Co.'s right of way, thence in an easterly direction to Idaho street, thence in a southerly direction to Spokane river, thence along Spokane river to the place of beginning.



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Opinion of the Court—Stewart, J., on Rehearing.

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“And that Ordinance No. 36 is hereby amended so as to read accordingly, and that all ordinances and sections of ordinances conflicting with this ordinance is hereby repealed.”

Then follows the provision with reference to the time the ordinance shall take effect and the history of its passage. It will thus be seen that this ordinance does not purport to amend any particular section of Ordinance No. 36 but pretends to amend the entire ordinance. The ordinance does not contain the entire ordinance or section as revised or amended as required by the statute. In order to read ordinance No. 40 as an amendatory ordinance of No. 36, we are called upon to exercise our judgment as to the particular section of No. 36 intended to be amended and to insert the amendment in lieu thereof. After the enacting clause follows the description, but where that description is to be placed in Ordinance No. 36, or what part of No. 36 it is to repeal or displace, is a matter left entirely to conjecture. This is not a compliance with the provisions of sec. 2276, *supra*. To make a valid amendment, the amendatory ordinance should comply with the provisions of the statute, that is, the new or amendatory ordinance should contain the entire ordinance or section as revised or amended, and not leave the question open to guess or conjecture as to the particular place where the amendment is to be inserted or what particular portion of the old ordinance is to be displaced by the new or amendatory ordinance. (McQuillan, *Munic. Ordinances*, sec. 195; *Pentecost v. Stilcs*, 5 Okl. 500, 49 Pac. 921.) For these reasons we are of the opinion that Ordinance No. 40 is void.

From what has been said it follows that no part of Ordinance No. 36 has been repealed or superseded by the provisions of Ordinance No. 40 which is held to be void. The common council of Post Falls did not repeal any provision in Ordinance No. 36 by adopting Ordinance No. 40, if the provisions of the latter are illegal and void, notwithstanding the fact that the latter ordinance contains a clause to the effect, “that all ordinances in conflict herewith are hereby repealed,” as it clearly appears that Ordinance No. 40 was to be a substitute for a part of Ordinance No. 36. The illegal

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Points Decided.

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and void character of Ordinance No. 40, in so far as amending Ordinance No. 36, renders illegal and void also the repealing clause found in Ordinance No. 40. (*City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; 26 Am. & Eng. Ency. of Law, 2d ed., 716, 717.)

The judgment will be *reversed* and a new trial ordered. Costs awarded to *appellant*.

Sullivan, C. J., concurs.

AILSHIE, J., Concurring.—In concurring I desire to add that I think the title to Ordinance No. 40 is insufficient for the same reasons that render the ordinance itself void.

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(April 4, 1910.)

EMIL TOMSCHE, Appellant, v. MARY HUMMEL, Respondent.

[108 Pac. 343.]

REAL ESTATE—QUIETING TITLE TO—CONFLICT IN EVIDENCE.

(Syllabus by the court.)

1. Evidence *held* sufficient to support the findings made by the court.

2. Where there is a substantial conflict in the evidence, the decision of the trial court will not be reversed.

APPEAL from the District Court of Shoshone County, First Judicial District. Hon. Wm. W. Woods, Judge.

Action to quiet title to real estate. Judgment for defendant. *Affirmed*.

James A. Wayne, for Appellant.

Kerns & Ryan, for Respondent.

Counsel cite no authorities on points decided.

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Points Decided.

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SULLIVAN, C. J.—This suit was commenced by the plaintiff, who is appellant, to quiet the title to lots 7 and 8 in block 8 of Canyon Addition to the city of Wallace, Shoshone county. The defendant answered by denying the allegations of the complaint and by way of cross-complaint sought affirmative relief and prayed to have her title quieted to said lots. The appellant did not answer said cross-complaint and default was entered against him. The action was tried by the court without a jury and findings of fact and conclusions of law were made by the court and judgment entered in favor of the defendant, quieting the title to said lots in her. This appeal is from that judgment.

Seven errors are assigned, all to the effect that the findings are not supported by the evidence.

We have carefully examined the evidence and concluded therefrom that the findings are fully sustained by it. On some material points there is a substantial conflict in the evidence, and under the well-established rule of this court, where that occurs, the judgment will not be reversed. It will serve no good purpose in this opinion to quote extensively from the evidence or to review it to any extent.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Stewart and Ailshie, JJ., concur.

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(April 9, 1910.)

A. H. FEATHERSTONE, Respondent, v. JOSEPH P. KEANE, Appellant.

[108 Pac. 337.]

**MOTION TO STRIKE—STATEMENT—TRANSCRIPT—FINDINGS—ISSUES—VERDICT—EFFECT OF.**

(Syllabus by the court.)

1. Where a proposed statement is not presented and settled within the time required by law and is inserted in the transcript, on motion, it will be stricken therefrom.

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Argument for Appellant.

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2. Under the provisions of Rule 25 of the rules of this court, the time during which the trial court or judge holds a bill of exceptions or statement prior to the settlement and filing thereof and the time during which the attorney for the respondent may retain the transcript on appeal before certifying or refusing to certify the same, must be excluded in computing the sixty days' time in which a transcript is required to be filed.

3. Where an action is brought to recover for money had and received and for services alleged to have been performed at the instance and request of the defendant, and the answer in effect denies the allegations of the complaint and sets up by way of cross-complaint certain damages alleged to have been sustained by the defendant on account of the neglect and incompetency of the plaintiff in performing certain services for defendant, and the cause is tried by the court with a jury, and the jury renders a verdict in favor of the plaintiff on his first cause of action and in favor of the defendant on the second cause of action, and does not mention the cause of action set out in the cross-complaint, the effect of such verdict is that the defendant is not entitled to recover on the alleged cause of action set up in the cross-complaint.

4. This being an action at law, the jury by its verdict in effect found upon all of the issues presented.

APPEAL from the District Court for Shoshone County, First Judicial District. Hon. Wm. W. Woods, Judge.

Action at law to recover for money due and received and for services rendered. Judgment for plaintiff. *Affirmed.*

J. P. Keane, for Appellant.

A decision and judgment that does not find on all of the material facts raised by the pleadings is against law, and its findings should be reversed. (*Wood v. Broderson*, 12 Ida. 190, 85 Pac. 490; *Brown v. Macey*, 13 Ida. 451, 90 Pac. 339; *Carson v. Thews*, 2 Ida. 176, 9 Pac. 605; *Bowman v. Ayers*, 2 Ida. 305, 13 Pac. 346; *Standley v. Flint*, 10 Ida. 629, 79 Pac. 815.)

The court erred in failing, neglecting and refusing to verify the statement of the case when it was shown by affidavit that it was impossible to obtain a transcribed copy of the evidence on account of the sickness of the court reporter.

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(*Warren v. Stoddard*, 6 Ida. 692, 59 Pac. 540; *Rumpel v. Oregon S. L. Co.*, 4 Ida. 13, 35 Pac. 700, 22 L. R. A. 725; *Hole v. Van Duzer*, 11 Ida. 79, 81 Pac. 109.)

Carlton Fox, for Respondent, files no brief.

SULLIVAN, C. J.—This action was brought to recover on two separate causes of action: First, on account of money had and received by the defendant for and on behalf of the plaintiff in the sum of \$400; and second, for personal services alleged to have been rendered for the defendant by the plaintiff of the value of \$300.00. The answer put in issue all the material allegations of the complaint and averred as an offset or counterclaim damages in the sum of \$12,000 resulting from incompetency and neglect on behalf of the plaintiff in performing certain services as an attorney for the defendant. The cause was tried by the court with a jury, and the jury returned the following verdict:

“We, the jury in the above-entitled action, find for the plaintiff on his first cause of action and assess his damages at four hundred dollars (\$400.00).

“We further find for the defendant on plaintiff’s second cause of action.”

On that verdict a judgment was entered in favor of the plaintiff for the sum of \$400. The appeal is from the judgment.

The respondent interposed a motion to strike from the transcript the statement or bill of exceptions contained therein, and to strike the transcript from the files. The motion to strike the statement from the transcript was based on the ground that it had not been filed, served and settled within the time required by law. Upon an examination of the record, we find the motion well taken and is therefore sustained.

The motion to strike the transcript from the files was based on several different grounds, the last one being that the transcript was not filed within sixty days from and after the appeal was perfected. On an examination of the record,

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Opinion of the Court—Sullivan, C. J.

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we find that the transcript was filed within the time provided by law, after deducting the time during which the attorneys for the respondent retained the transcript on appeal before certifying or refusing to certify the same. Rule 25 of the rules of this court provides that the time above referred to shall be deducted from the sixty-day period within which the transcript must be filed after an appeal has been perfected.

We have examined the other grounds contained in said motion to strike the transcript from the files and find no cause therein for granting the motion. The motion to strike the transcript is therefore denied.

This leaves the case for hearing upon the judgment-roll alone, which contains no bill of exceptions or statement on motion for a new trial.

It is contended that the court did not find upon all of the issues made by the pleadings. There is nothing in that contention, as this is an action at law and the jury found for the plaintiff upon the first cause of action stated in the complaint and for the defendant on the second cause of action. The jury by its verdict in effect found that the defendant was not entitled to any damages as an offset against plaintiff's claim, or at all, thus settling all of the issues made by the pleadings. There is no merit in defendant's contention that the court failed to find upon all of the issues made by the pleadings.

The judgment is therefore affirmed, with costs of this appeal in favor of the respondent.

Stewart and Ailshie, JJ., concur.

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Points Decided.

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(April 21, 1910.)

COAST LUMBER CO., Plaintiff, v. FREMONT WOOD,  
Judge, Defendant.

[108 Pac. 336.]

STATEMENT ON MOTION FOR A NEW TRIAL—AMENDMENTS TO—WHEN  
ADOPTED—PRESENTATION FOR SETTLEMENT—TIME FOR—JURISDIC-  
TION OF JUDGE—MANDATE.

(Syllabus by the court.)

1. Under the provisions of subd. 3 of sec. 4441, Rev. Codes, if a proposed statement on motion for a new trial be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto and serve the same or a copy thereof on the moving party. If the amendments be adopted, the statement shall be amended accordingly and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall within ten days thereafter, by the moving party, delivered to the clerk of the court for the judge and thereupon the same proceedings for the settlement of the statement shall be taken by the parties and clerk and judge as are required for the settlement of bills of exception by sec. 4430, Rev. Codes. And if no amendments are served within the time designated, or if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge for settlement without notice to the adverse party.

2. Where proposed amendments and the proposed statement are not delivered to the clerk of the court for the judge within ten days after the service of such amendments upon the moving party, the presumption is that such amendments have been adopted and will be so treated, and the amendments and statement may be presented to the judge for settlement within a reasonable time after the expiration of said ten days.

3. *Held*, under the facts of this case that the court had not lost jurisdiction to settle the statement and that he erred in refusing to settle the same.

4. Under the provisions of said subd. 3 of sec. 4441, Rev. Codes, in settling the statement, it is the duty of the judge to strike out of it all redundant and useless matter and make the statement truly represent the case, notwithstanding the assent of

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Argument for Defendant.

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the parties to such redundant and useless matter or to any inaccurate statement.

5. The case of *Miller v. Hunt*, 7 Ida. 486, 63 Pac. 803, cited and distinguished.

An original application to this court for a writ of mandate to Honorable Fremont Wood, Judge of the District Court of the Third Judicial District, to compel him to settle a statement on motion for a new trial. Peremptory writ granted.

C. M. Kahn, and A. A. Fraser, for Plaintiff.

The question now before the court for decision has in principle been directly decided in the case of *Miller v. Hunt*, 7 Ida. 486, 63 Pac. 803.

The language of the statute with regard to the time when the statement to which no amendments have been proposed shall be presented to the trial judge for settlement is practically identical with the language in the statute where amendments have been proposed and thereafter adopted by the other party, and is directly in line with the California authorities upon this question. (*Black v. Hilliker*, 130 Cal. 190, 62 Pac. 481; *Gay v. Torrence*, 143 Cal. 14, 76 Pac. 717; *Hoehnan v. Dry Goods Co.*, 8 Ida. 66, 67 Pac. 796; *Hicks v. Masten*, 101 Cal. 651, 36 Pac. 130.)

The language of the statute limiting the time to ten days within which time the amendments must be filed in order that the judge may have jurisdiction to settle them has reference only to the amendments proposed and served by the opposite party, and has no reference whatever to such amendments as the court may see fit to order on his own motion.

N. M. Ruick, for Defendant.

The action of the district judge in this matter is entirely justified by the decision of this court in *Hoehnan v. New York Dry Goods Co.*, 8 Ida. 66, 72-74, 67 Pac. 796. See, also, *Sandstrom v. Smith*, 11 Ida. 779, 84 Pac. 1060; *Swartz v. Davis*, 9 Ida. 238, 74 Pac. 800; *Brown v. Hanley*, 3 Ida. 219,



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28 Pac. 425; *Bank v. Baldwin*, 14 Ida. 75, 93 Pac. 504, 17 L. R. A., N. S., 676.

"The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it. The engrossed statement was then a new statement presented for allowance and the judge was not authorized to settle and allow it." (*Willis v. Kong*, 70 Cal. 548, 11 Pac. 780; *Ryer v. Rio Land etc. Co.*, 147 Cal. 462, 82 Pac. 62; *Henry v. Meguire*, 106 Cal. 142, 39 Pac. 600.)

In California, owing to the provision (Code Civil Proc., sec. 659) requiring five days' notice of settlement to be given within ten days after the amendments are proposed and served, it is held that the failure to give this notice, which is equivalent to notice of nonadoption, indicates that the amendments have been adopted. This could not be true under the Idaho statute, which contains no provision requiring notice of settlement to be given within the ten days and simultaneously with the delivery of the statement to the clerk or presentation of it to the judge.

The Kansas case, *Ferree v. Walker*, 54 Kan. 49, 36 Pac. 738, cited in the Hoehnan case, 8 Ida. 73, 67 Pac. 796, is a very strong case, and is cited and approved in *Phelps etc. Co. v. Deming*, 6 Kan. App. 502, 50 Pac. 944.

SULLIVAN, C. J.—This is an original application to this court for a writ of mandate to compel Honorable Fremont Wood, judge of the district court of the third judicial district, to settle a statement on motion for a new trial and appeal, in the case of Charles N. Maw, plaintiff, v. The Coast Lumber Co., a corporation. That action was brought to recover for injuries alleged to have been sustained by the plaintiff by reason of a defective, unsafe and insecure condition of a certain ripsaw used in the mill of the defendant. The said plaintiff was injured by being struck on the head by a piece of board or timber projected with great force from said ripsaw. That cause was tried by the court with a jury and a verdict was rendered and entered on April 14, 1909, in favor of the plaintiff, for \$12,500. Thereafter the

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lumber company made its motion for a new trial and prepared and served upon the attorneys for said Maw its proposed statement on motion for a new trial and appeal. Thereafter the attorneys for said Maw served upon the attorney for the Coast Lumber Co. his proposed amendments to said statement on motion for a new trial, consisting of 120 distinct amendments. On the 22d day of February, 1910, the attorney for the lumber company was informed by telephone by the attorney for Maw that said judge of the district court would settle said statement on that day, and the attorneys for the respective parties appeared before the judge at the time so fixed. At that time the attorney for Maw served upon the attorney for the lumber company two certain papers, one denominated "Objections by plaintiff to settlement of defendant's proposed bill of exceptions," and the other, "Additional objections by plaintiff to settlement of defendant's proposed bill of exceptions."

Prior to the time of the service of said papers upon the attorney for the lumber company, he had not made any objections to the adoption of the proposed amendments and had not filed such proposed amendments with the clerk of the court to be presented to the judge for settlement. He alleges, however, in his petition for the writ that he was willing to and did accept all amendments served upon him prior to February 22, 1910, and any objection or refusal he had to the adoption of the same on said date was by reason of the filing and serving upon said attorney of the paper denominated "Additional objections by plaintiff to settlement of defendant's proposed bill of exceptions," which he claims was in effect an amendment to the statement. At the time of the hearing, the attorney for the lumber company made some objection to some of the amendments offered. The matter was then heard by the judge on said 22d day of February and on the 24th day of that month, the judge announced orally that he would sustain the objections of counsel for the plaintiff, Maw, to the settlement of said proposed statement. Thereafter, on the 8th day of March, 1910, the attorney for the lumber company duly presented to said judge

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for settlement its proposed statement on motion for a new trial and appeal, duly engrossed. It contained the original statement theretofore served on said attorney for Maw as modified by the proposed amendments, and omitted from said statement all matters objected to by said counsel for Maw in his objections filed on February 22d. The district judge then and there refused to sign and settle said statement on the ground that he had no jurisdiction to sign and settle the same.

Upon that state of facts, this court issued the alternative writ of mandate and upon the return thereof, the defendant filed a general demurrer and answer to said application. Thereupon the Coast Lumber Co. filed its general demurrer to the answer of the defendant. Upon that condition of the record, the cause was argued by respective counsel and submitted for decision.

The question arises: Had the court lost jurisdiction to settle the proposed statement?

The facts above set forth are substantially admitted by the answer of the Honorable District Judge, and the following statement is found in the answer, to wit:

"Neither of the attorneys for plaintiff at any time suggested to me the fixing of a time for the settlement of the statement, neither did the defendant's attorney at any time notify me or indicate to me that he had accepted or adopted, or proposed to accept or to adopt, plaintiff's amendments to defendant's proposed statement on motion for a new trial or any portion thereof, prior to the hearing on February 22d, 1910, and then offered to accept a part only of the amendments proposed; that, at the time and place fixed by me, to wit, on February 22d, 1910, the matter of settlement of said proposed statement on motion for a new trial came on to be heard before me as judge of said court, N. M. Ruick appearing as attorney for plaintiff and Charles M. Kahn appearing as attorney for defendant. Whereupon Mr. Ruick, of counsel for plaintiff, filed objections to the settlement of defendant's proposed statement on motion for a new trial upon the ground that the court had no jurisdiction to settle said

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proposed statement but had lost jurisdiction to settle the same by reason of facts appearing of record in said cause as follows:

“1. Said proposed bill of exceptions was served on N. M. Ruick, of counsel for plaintiff, on December 10, 1909.

“2. On December 18th, 1909, on the application of counsel for plaintiff, the judge of said court made an order extending the time allowed plaintiff under the statute within which to propose and serve amendments to defendant's proposed statement on motion for a new trial to and including thirty (30) days from said date.

“3. That, on January 15th, 1910, as shown by the written admission of service by defendant's attorney indorsed on such proposed amendments, plaintiff served upon counsel for defendant a copy of plaintiff's proposed amendments to said defendant's proposed statement on motion for a new trial.

“4. That said amendments were not adopted within the time allowed by the statute for the delivery of said proposed statement and proposed amendments to the clerk of the court for the judge, nor have the same ever been adopted.

“5. That said proposed statement and amendments were not, within ten (10) days after the service of such amendments upon the attorney for defendant, as shown by such admission of service (defendant being the moving party), delivered to the clerk of said court for the judge, nor had the same been so delivered, when said objection was made.

“That, after such objections had been made and presented, counsel for defendant delivered to me, the Judge of said court, the copy theretofore on January 15th, 1910, served upon him of plaintiff's proposed amendments to defendant's proposed statement on motion for a new trial and then and there offered to accept a part only of the amendments proposed. This was the first time and occasion on which said amendments had been presented to me. That thereafter in open court on the 24th day of February, 1910, N. M. Ruick being present representing the plaintiff, and C. M. Kahn being present representing the defendant, and, after con-

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sidering the objections offered by plaintiff to the settlement of the proposed statement on motion for a new trial, I sustained such objections upon the ground and by reason of the facts as hereinbefore stated, and then and there declined and refused to settle said proposed statement upon the ground that, as such judge, I had no jurisdiction to settle said proposed statement but had lost jurisdiction to settle the same by reason of the facts as hereinbefore stated, and I then and there directed Mr. Ruick, counsel for plaintiff, to prepare a certificate and order embodying the facts and the ruling of the court and present it for my signature.

“Shortly thereafter and before the order was signed, Mr. Alfred A. Fraser, attorney, not then an attorney of record in the cause and whom I then for the first time learned was interested as an attorney on behalf of defendant, requested me to withhold my signature to the order until he could present a further application for the settlement of the statement, stating that he would have to have time to engross the statement and include the amendments therein; in compliance with which request, I withheld signing said certificate and order containing the facts and my decision of February 24th, until after the presentation, as hereinafter referred to, of the engrossed statement.

“That, on the 28th day of February, 1910, said defendant, Coast Lumber Company, through its attorney, C. M. Kahn, withdrew the original proposed statement on motion for a new trial, which had been handed to me by the clerk of the court on the 10th day of December, 1909, and also withdrew at the same time the proposed amendments of plaintiff presented to me for settlement on the 22d day of February, 1910.

“That, thereafter, on the 8th day of March, 1910, the defendant appearing by its attorneys, C. M. Kahn and Alfred A. Fraser, presented to me as such judge an engrossed statement on motion for a new trial in said cause for settlement: said engrossed statement consisting of the original proposed statement on motion for a new trial served and filed on the 10th day of December, 1909, with the amendments served

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on the defendant on the 15th day of January, 1910, incorporated and embodied therein, with the request from the attorneys for said defendant, that the same be settled as said defendant, Coast Lumber Company's, statement on motion for a new trial, giving me as a reason that said defendant had then accepted the amendments proposed by plaintiff to said defendant's statement on motion for new trial, which said application to settle said statement on motion for new trial. I declined and declined to settle said statement, for the reason that the matter had already been disposed of by my decision and order of February 24th, 1910, and that I had no jurisdiction to settle said statement, and for the further reason the said proposed amendments had not been accepted and incorporated in the original statement on motion for a new trial and presented to me as judge for settlement within a reasonable time after the service of said amendments.

"Whereupon, I then and there subscribed to a certificate in writing of the proceedings on the refusal by me as such judge to settle said proposed statement on motion for a new trial in the said cause of Maw, plaintiff, v. Coast Lumber Company, defendant, a copy of which said certificate and order is hereto annexed, marked 'Defendant Fremont Wood's Exhibit No. 1,' and made a part of this answer and showing why I, as judge of said court, should not settle said statement on motion for a new trial."

It will be observed from the allegations of the answer above set forth that the judge concluded from the facts presented that he had lost jurisdiction to settle said statement. The provisions of the statute in regard to the settlement of a statement on motion for a new trial, applicable to this case, are found in subd. 3 of sec. 4441 of the Rev. Codes of 1909, which is as follows:

"If the motion is to be made on a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party.

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“If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly and then presented to the judge, who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be by the moving party delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk and judge, as are required for the settlement of bills of exception by section 4430. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. When the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient.

“When the notice designates as the ground of the motion errors in law occurring at the trial and excepted to by the moving party, or deemed excepted to, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee in settling the statement, to strike out of it all redundant and useless matter and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.”

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It will be observed from the above provisions that if a proposed statement be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto and serve the same, or a copy thereof, on the moving party, and if the amendments be adopted, the statement shall be amended accordingly and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge; and if not adopted, the proposed statement and amendment shall within ten days thereafter be by the moving party delivered to the clerk of the court for the judge. In this case the amendments were not delivered to the clerk for the judge within ten days after they were served on the moving party. From that fact the presumption arises that they were adopted. The statute does not make it the duty of the moving party to deliver the amendments to the clerk for the judge unless they are not adopted. Said statute provides in cases where the amendments are adopted that the statement with the proposed amendments may be presented to the judge for settlement without notice to the adverse party, and as no time is fixed by the statute in which they must be presented to the judge, if they are presented within a reasonable time, the law is satisfied. However, in this case it is contended that on the 22d of February, the time fixed by the court for settling said statement, counsel for the adverse party moved to strike out certain portions of said proposed statement and objected, on the grounds above set forth, to its settlement. Thereupon counsel for the moving party insisted that all of said amendments should not be allowed, and the court concluded that it had lost jurisdiction to settle the statement, for the reason that all of the amendments proposed had not been adopted by counsel for the moving party. If the failure of the moving party to deliver to the clerk for the judge the proposed amendments within ten days after their service on him was in effect an adoption of the amendments, that ended the matter, and the amendments were adopted, and it was too late for the moving party then to object to such amendments or refuse to adopt them. It was also too late for the adverse



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party to offer any amendments after the time had expired in which he was given to serve his amendments.

From the facts presented, the matter stood on the 22d of February in this condition, and it must be borne in mind that the hearing on that day was not brought on by counsel for either of the parties, but on the suggestion of the judge. Counsel for the adverse party moved to strike certain matter from the proposed statement that was not embodied in his proposed amendments, and also raised other objections to the settlement of the statement. Counsel for the moving party thereupon contested the matter and urged that certain of the amendments proposed ought not to be adopted, and the judge took the view that as counsel for the moving party objected at that time to the adoption of certain amendments, that he had lost jurisdiction to settle said statement, for the reason that the proposed amendments had not been delivered to the clerk for him within ten days after service of such amendments. But under the law it was too late for counsel for the adverse party to ask for anything additional that would result in the amendment of the statement, and it was also too late for the moving party to insist that he had not adopted all of the amendments, and the court erred in holding that he had lost jurisdiction, and should have directed the proposed statement, with all of the amendments that had been proposed in time, to be engrossed and settled, and after that was done, if said engrossed statement then truly represented the case, it was the judge's duty to settle it. It is the judge's duty, however, notwithstanding the assent of the parties to a statement or bill of exceptions, to strike out of it all redundant or useless matter and to make it truly represent the facts of the case. By the provisions of said statute, it is incumbent upon the judge to strike from a proposed statement all redundant and useless matter, regardless of whether the parties have agreed to it or not, and to insert any matter necessary to make the statement speak the truth. In other words, the judge is not bound to settle a statement if assented to by both parties, unless it speaks the truth and

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truly represents the case. (*Humbird Lumber Co. v. Kootenai Co.*, 10 Ida. 490, 76 Pac. 396.)

Counsel for the defendant contends that the action of the judge in this matter was probably predicated upon and was justified by the decision of this court in *Hoeknan v. New York Drygoods Co.*, 5 Ida. 66, 67 Pac. 796. This court held in that case if amendments are proposed to a statement on motion for a new trial and not adopted by the moving party, under the provisions of subd. 3 of sec. 4441, Rev. Codes, they must be delivered to the clerk for the judge, and if the amendments be adopted, the statement shall be amended accordingly and then presented to the judge who tried the case for settlement, or be delivered to the clerk of the court for the judge, and if the time for settlement of the statement has expired and such fact appears from the record, the trial court is without jurisdiction to settle the same. The facts in that case were different from the facts in the case at bar, and it was held under that state of facts that the statutory time for the settlement of the statement had lapsed and the court had no jurisdiction to extend the time. The question presented in the case at bar was not presented in that case. Counsel in that case did not adopt the proposed amendments but insisted on having such amendments settled, and set up facts tending to show excusable neglect for having failed to deliver the amendments to the clerk for the judge within ten days after their service. The moving party in that case was not willing and did not consent to the adoption of the proposed amendments, whereas in the case at bar, it appears that the amendments were adopted.

Counsel also cite *Wills v. Kong*, 70 Cal. 548, 11 Pac. 781. That case involved the settlement of a statement to which amendments had been proposed. Upon objection by the plaintiff, the judge refused to settle the statement. The defendant thereafter engrossed the statement with the proposed amendments and presented the engrossed statement to the judge for settlement, after the time for service of the statement had passed. It was held under the statute of California that the judge was not authorized by the statute to settle

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the statement under that state of facts. Subd. 3 of sec. 659 of the California C. C. P. reads as follows: "If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge." That subdivision is different from the provisions of subd. 3 of sec. 4441 of the Idaho Code above quoted.

In *Hicks v. Masten, Judge*, 101 Cal. 651, 36 Pac. 130, the court had under consideration subd. 3 of said section 659 of the Cal. C. C. P., and it was there held that the written notice required by the provisions of said section of the presentation of a proposed bill of exceptions and the amendments thereto to the judge for settlement is for the benefit of the adverse party and may be waived by him. In open court, when the attorney for the adverse party was present, counsel for the moving party requested the court to fix a time for the settlement of the bill of exceptions, and the judge, from the bench, stated that the bill of exceptions and objections to the settlement and proposed amendments to the bill had been left with him for settlement, and that he would proceed to settle the same on the 12th day of April, 1902, at 10 o'clock at his chambers, and requested both parties to be present. No written notice of the presentation of the proposed bill and amendment was served by the moving party. At the time fixed by the court, the counsel for both parties were present and the adverse party's attorney then presented written objections to settling the bill, upon two grounds: First, that the proposed bill of exceptions was not prepared and served in time; second, that the five days' notice in writing required by the Code had not been given, and on the latter ground the judge refused to settle the bill. The supreme court held under that state of facts that the court erred in not settling the bill, and in that case the court cites the case of *Wills v. Kong, supra*, and quotes from it as follows: "The judge having once refused to settle the statement, the matter was ended so far as that officer was empowered to settle it." The court then said: "What was

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there said was upon facts which justified it. It was said of a statement presented long after the time for the service of a statement had passed, and after the court had refused to settle a prior statement, no complaint as to the refusal to settle the first statement appearing in the case," and directed the writ of mandate to issue requiring the judge to settle the statement. Provisions of our statute for the settlement of statements on motion for a new trial must be liberally construed with a view to promoting the rights of the parties and in the interest of justice. (Sec. 4, Rev. Codes; *Douglas v. Southern Pac. Co.*, 151 Cal. 242, 90 Pac. 538.)

In *Miller v. Hunt*, 7 Ida. 486, 63 Pac. 803, this court held that where no amendments were served on the adverse party to a proposed statement within the statutory time, the provisions of sec. 4441 do not limit the time within which to present the statement for settlement. Of course, the facts of that case are not the same as the facts in the case at bar.

In accordance with the conclusion that we have above reached, the failure of the moving party to deliver the amendments with the proposed statement to the clerk for the judge within ten days after such amendments are served is in effect an adoption of such amendments, in which case the statement may be settled by the court within a reasonable time. It is therefore ordered that the peremptory writ of mandate do issue against the respondent, commanding him to proceed and settle and certify said statement.

Costs are awarded to the plaintiff.

Stewart and Ailshie, JJ., concur.

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Points Decided.

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(April 9, 1910.)

**FRANK S. HEATH, Respondent, v. POTLATCH LUMBER  
COMPANY, a Corporation, Appellant.**

[108 Pac. 343.]

**SUFFICIENCY OF EVIDENCE—COMPROMISE AGREEMENT—AUTHORITY TO  
MAKE—CONSIDERATION—AMENDMENT OF PLEADING.**

(Syllabus by the court.)

1. Evidence examined and *held* to support the verdict of the jury.

2. Whether an assistant general manager of a lumber company, in charge of the operation of the company's plant, has authority to make a contract with an injured employee in compromise of damages claimed by such employee, is immaterial if such company ratifies the acts of the assistant general manager in making such compromise agreement, and makes payments in accordance with the terms thereof.

3. Where a claim is made against another in good faith, and the latter denies its liability, and to avoid a lawsuit agrees to pay such claim in consideration that suit will not be brought upon such claim, there is a sufficient consideration to support such compromise agreement.

4. There is sufficient consideration to support a compromise agreement if the claim is made in good faith and is disputed, and in consideration that the claimant forbears to sue in respect to such claim, a promise is made to pay a certain sum of money, and such promise may be enforced in an action at law.

5. It is not error for the trial court to refuse a proffered amendment after the evidence has been concluded, where there is no evidence to support the allegations of such proposed amendment.

6. Where a check is given as a partial payment in accordance with a compromise agreement, the fact that the person giving such check incorporates therein language releasing the payor for all claims and damages, will not operate to release the promisor from complying with the compromise agreement, unless it clearly appears that it was the intention of both parties that such check should be in full payment of all claims and demands whatsoever.

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

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Argument for Respondent.

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An action to recover upon a compromise agreement. Judgment for plaintiff. Defendant appeals. *Affirmed.*

Geo. M. Ferris, James E. Babb, and A. H. Featherstone, for Appellant.

The defendant cannot be held liable in damages because one of its employees, a managing officer, advises an injured man to go to a hospital to effect a cure and later promises the injured man that the company will pay him wages until he is cured if he will not sue for damages growing out of the assistant manager's poor judgment in recommending a doctor. This was outside the duty of Mr. Laird, and he had no authority to bind his principal. (*Bohanan v. Boston Main Ry.*, 70 N. H. 526, 49 Atl. 103; *Backman v. Charlestown*, 42 N. H. 125-131; *Flander v. Putney*, 58 N. H. 358; *Hayes v. Colby*, 65 N. H. 192, 18 Atl. 251; *Maxson v. Michigan Cent. Ry. Co.*, 117 Mich. 218, 75 N. W. 459; *Delta Lumber Co. v. Williams*, 43 Mich. 86, 40 N. W. 940; *Nephew v. Michigan Cent. Ry. Co.*, 128 Mich. 599, 87 N. W. 753; *Gamacho v. Engraving Co.*, 14 Misc. Rep. 586, 37 N. Y. Supp. 725; *Chase v. Swift*, 60 Neb. 696, 83 Am. St. 552, 84 N. W. 86; *Demars v. Musser Sauntry Co.*, 37 Minn. 418, 35 N. W. 1.)

Defendant's Exhibit "F," the check with release clause attached, cashed by the plaintiff, has two purposes in the case. It tends to show that there was no agreement of compromise and that the plaintiff's claim was unliquidated. He does not claim fraud or surprise or even mistake, and he is, therefore, bound by his release. (*Webber v. Board of Commrs.*, 93 Minn. 320, 101 N. W. 296; *Hillestad v. Lee*, 91 Minn. 335, 97 N. W. 1055; *Nassoiv v. Tomlinson*, 48 N. Y. 326, 51 Am. St. 695, 42 N. E. 715; *Treat v. Price*, 47 Neb. 875, 66 N. W. 834; *Chicago Ry. Co. v. Buckstaff*, 65 Neb. 334, 91 N. W. 426.)

Wm. E. Stillinger, and Forney & Moore, for Respondent.

The compromise of a *bona fide* dispute or controversy constitutes a good consideration for a promise, and such consideration cannot be destroyed or the promise revoked by show-

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ing that the promisee in fact had no claim. (*Vane v. Towle*, 5 Ida. 471, 50 Pac. 1004; *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460; *Whelpley v. Stoughton*, 112 Mich. 594, 70 N. W. 1098; *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115; *Morgan v. Hodges*, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438; *Beach on Contracts*, sec. 174 et seq.; 8 Cyc. 509.)

STEWART, J.—The appellant, a corporation, was engaged in the operation of a sawmill and a lumber manufacturing plant in the town of Potlatch, in Latah county, state of Idaho. The respondent was employed by the appellant as a barn man and engaged in feeding and taking care of the appellant's stock and cleaning and caring for the barns and stables where such stock was kept. On June 22, 1907, and while the respondent was in the employ of the appellant, he was called to assist one Ira George, a department manager of the business of the appellant, who as such had control and management of all stables, barns, horses, teams, wagons, etc., used by the appellant, in raising and assisting a sick horse to his feet; it appears that the horse was lying on his side in a box-stall located in one of the barns of the appellant, and said George requested the respondent to go in between the wall of the box-stall and the back of the horse and assist in raising the horse to his feet; that the horse was sick and unable to stand alone, and that while plaintiff was assisting said George in raising said horse to his feet said horse fell upon the plaintiff and injured plaintiff in such manner as to break both bones of his right leg.

At the time this accident occurred it appears to have been a rule of the appellant company to require all employees to pay one dollar a month as a hospital fee, the payment of which entitled the employee to hospital services in case of sickness or injury, in either a hospital located in Palouse, Washington, and conducted by one E. T. Hein, or in a hospital at Moscow, Idaho, conducted by one Charles L. Gritman; that appellant company had collected and withheld from the moneys and wages due the respondent for the months of March, April, May and June, 1907, one dollar for each month as a hospital

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fee, and issued to the respondent a card on the Gritman Hospital at Moscow, Idaho, and that such card was in full force and effect at the time of the accident; that after the accident respondent requested that he be taken to the hospital of Gritman at Moscow but was urged by A. W. Laird, the assistant general manager of the appellant company, to go to the hospital of E. T. Hein at Palouse, and finally consented and was taken to such hospital. He remained at the Hein hospital for several weeks. He was not satisfied at this hospital and complained of the treatment he received, and was returned to his home at Palouse. He complained to Laird that Hein was incompetent and did not give him proper treatment, and that he was not improving as he should, and he felt as though the company had not treated him right in urging him to go to the Hein hospital, and told Laird that he intended to bring an action against the appellant company for damages because of such treatment. He testifies that he made such complaint to Laird, and after having told Laird that he intended to bring an action against the company, Laird told him if he would say nothing about an action he would see that his wages were sent up to him each month. It appears that he had been receiving \$2.50 a day as wages, including Sundays. This conversation Laird denies; he does admit that plaintiff made complaint to him of his mistreatment, but denies that the question of suit or action for such treatment was ever mentioned by plaintiff. He testifies that he did tell the plaintiff that he would see that he was taken care of and would send him money when needed; whether Laird agreed to pay him his wages until he was able to go to work again, in consideration that the plaintiff would forego suit, is the foundation for this action.

The plaintiff brought this action to recover the sum of \$1,250 claimed to be due him by reason of this agreement. The cause was tried to a jury and a verdict returned in favor of the plaintiff for the sum of \$650. A motion for a new trial was denied and this appeal is from the judgment and from the order overruling the motion for a new trial.



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It is first contended that the evidence does not support the verdict. In corroboration of the plaintiff's testimony the plaintiff introduced in evidence the following check:

## "POTLATCH LUMBER COMPANY.

No. 8063.

Potlatch, Idaho, Aug. 16, 1907.

|                                                    |              |
|----------------------------------------------------|--------------|
| Pay to Frank Heath or order in payment in full for |              |
| labor from date of injury, June 22, '07, to Aug.   |              |
| 1st, 1907, 38 days at \$2.50.....                  | \$95.00      |
| Less July rent.....                                | \$10.70      |
| 3 loads of wood in August.....                     | 4.50         |
|                                                    | <u>15.20</u> |
|                                                    | \$79.80      |

Above Frank Heath hereby releases all claims of whatsoever nature against Potlatch Lumber Company.

Seventy-nine and 80-100 Dollars.

If not correct, return without alteration, stating differences.

POTLATCH LUMBER COMPANY,

By A. W. LAIRD,

Asst. General Manager.

To Potlatch State Bank,  
Potlatch, Idaho."

This check was indorsed by the plaintiff and paid.

It will be seen that the terms of this check tend to support the evidence of the plaintiff to the effect that the defendant would pay him his wages during the time he was unable to work by reason of the injury and that this check was in payment of such wages. Also a second check issued to plaintiff as follows:

## "POTLATCH LUMBER COMPANY.

No. 9303.

Potlatch, Idaho, Sept. 30, 1907.

|                                                   |              |
|---------------------------------------------------|--------------|
| Pay to F. S. Heath or order in payment of his Au- |              |
| gust time 31 days at \$2.50.....                  | \$77.50      |
| Less his August House rent.....                   | \$10.70      |
| Less his Sept. House rent.....                    | 10.70        |
|                                                   | <u>21.40</u> |
|                                                   | \$56.10      |

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In full for all claims for injuries or damages of whatsoever nature against the Potlatch Lumber Co.

Fifty-six and 10-100 Dollars.

If not correct, return without alteration, stating differences.

POTLATCH LUMBER COMPANY,

By A. W. LAIRD,  
Asst. General Manager.

To Potlatch State Bank,  
Potlatch, Idaho."

Accompanying this check was the following communication:

"Potlatch, Idaho, Oct. 2nd, 1907.

Mr. Frank S. Heath,  
Moscow, Idaho.

Dear Sir: Enclosed find check for \$56.10 which is in full payment for your August time, less house rent for August and September.

We have been glad to help you out by allowing you time from your injury up to September 1st, but feel that we cannot longer continue the help, as it is contrary to our custom to do this.

Trusting you will think this satisfactory, we are,  
Yours truly,

POTLATCH LUMBER COMPANY.

By A. W. LAIRD,  
Asst. Gen. Mgr."

This latter check was not cashed by the plaintiff, and was returned by him to the defendant.

These remittances, taken in connection with the evidence of the plaintiff, we think were sufficient to warrant the jury in concluding that Laird did agree to pay plaintiff his regular wages if the plaintiff would do nothing with reference to an action against the company for alleged mistreatment received by him at the hospital, where he went at the request of the defendant company.

It is next contended that the appellant company cannot be held in damages because one of its employees, the managing

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officer, advises an injured man to go to a hospital to effect a cure and later promises the injured man that the company will pay him his wages until he is cured if he will not sue for damages growing out of the assistant manager's poor judgment in recommending such hospital, for the reason that such act on the part of the assistant manager is outside of his duty as such, and in giving such advice he has no authority to bind his principal.

It appears from the record that A. W. Laird, the person advising the plaintiff and urging that he go to the Hein hospital instead of the Gritman hospital, where he had a hospital card, was an assistant general manager of the business of the appellant company. He was on the ground at the time the accident occurred. He came to the plaintiff after the injury and conversed with him about receiving treatment for such injury, and was the only person speaking or acting for the company in such matter. In addition to this, after the appellant had followed the advice of Laird and the compromise agreement was entered into as claimed by the plaintiff, Laird issued checks to plaintiff in payment of his wages as agreed, signed the company's name to such checks, and the company accepted one of such checks and cashed the same. In other words, all the evidence tends to show authority, and there is no evidence tending to show that Laird did not have authority to make such compromise agreement, but whether he originally had the authority to make the compromise agreement, yet he did make such agreement, and the company ratified the same by approving his acts and paying a check issued by him in the name of the company to carry out such compromise agreement. Under such circumstances we are satisfied that the making of such agreement was fully ratified and approved by the company, and that the company is bound by the acts of its assistant general manager. (*Brighton v. Lake Shore & M. S. Ry. Co.*, 103 Mich. 420, 61 N. W. 550.)

It is also contended that there was no consideration for the compromise agreement, even admitting that such agreement was made, for the reason that the evidence does not show an honest belief by both parties that the plaintiff's claim for

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damages was doubtful. In other words, plaintiff contends that to support a settlement and compromise, both parties must *bona fide* consider the question a doubtful one and that the compromise was made to avoid a lawsuit upon a doubtful claim. In the case of *Vane v. Towle*, 5 Ida. 471, 50 Pac. 1004, this court summarized the opinion by stating in the syllabus as follows: "While the compromise of a claim asserted upon the one side, but questioned upon the other, will be deemed a sufficient consideration to support an agreement to pay such claim, it is still essential that the claim so asserted should have some basis upon principles of law or equity." In *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115, the supreme court of Oregon entered into a very full discussion of this question and said:

"It is not every disputed claim, however, which will support a compromise, but it must be a claim honestly and in good faith asserted, concerning which the parties may *bona fide* and upon reasonable grounds disagree. The compromise of such a claim in good faith is a good consideration to pay money in settlement thereof, and when an action is brought upon such promise it is no defense to say that the claim was not in fact a valid one, or that the parties were mistaken either as to the law or the facts. . . . Nor is it a defense that the claim could not have been maintained if suit or action had been brought upon it, or that the parties were mistaken as to the law; for if it is, then it would follow that contracts by the parties settling their own disputes would at least be made to stand or fall according to the opinion of the court as to how the law would have determined it. 'If, therefore,' says Logan, J., 'the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves.' . . . The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. And when such settlement

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is characterized by good faith, the court will not look into the question of law or fact in dispute between the parties, and determine which is right. All that it needs to know is that there was a controversy between the parties, each claiming in good faith rights in himself against the other and that such controversy has been settled."

In 8 Cyc., page 509, the author cites a large number of cases and announces his conclusion as follows:

"The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties *bona fide* considered it so, and that the compromise of a disputed claim made *bona fide* is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoidance or settlement of litigation, and compromises in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claim of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed." (*McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460.)

It is disclosed by the record that after the injury the plaintiff desired to be taken to the Gritman hospital, and that he was not taken there but was taken to the Hein hospital because of the urgency of Laird, and that he was dissatisfied from the inception with the treatment given to him at the Hein hospital, and claimed that the company had not treated him right in inducing him to go to the Hein hospital instead of the Gritman hospital, and complained to Laird of such mistreatment, and informed Laird of his intention to bring suit against the company for damages sustained by him because of such mistreatment. Whether the plaintiff in fact could have maintained such action is not the test in determining whether there was a consideration for the compromise agreement. If the plaintiff made his claim in good faith and the defendant company denied its liability, and to avoid a law-

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suit agreed to pay the plaintiff his wages as a consideration for the plaintiff's not bringing such suit, then there was sufficient consideration to support such compromise agreement. In such cases it is sufficient if the plaintiff in good faith makes a claim and the defendant disputes such claim, and in consideration of the plaintiff's forbearance to sue in respect to such claim promises to pay plaintiff a certain sum of money. In such case there is a consideration for such promise, and the same may be enforced in an action at law.

In determining the good faith of the plaintiff, in making a claim against the defendant for damages, the jury no doubt very properly took into consideration the fact that the plaintiff was taken to the Hein hospital against his own desire and wish and at the solicitation and urgent request of Laird who acted for the company. This fact, no doubt, also influenced the defendant in entering into the promise to pay the plaintiff his wages until he was able to resume work. The defendant, no doubt, felt responsible for the plaintiff being taken to the Hein hospital, and no doubt felt that if in fact the plaintiff did not receive proper care and attention at such hospital, that the company was in some way responsible because of the fact that the plaintiff went to such hospital at the company's solicitation. When all these facts are considered, we believe the evidence is sufficient to show that there was a consideration to support the compromise agreement sued upon.

At the close of the evidence counsel for appellant asked leave to amend its answer to conform to the proof by making the following allegation: "That the delivery of the check marked 'Exhibit F,' and its acceptance by the plaintiff, is in accord and satisfaction of, and a bar to, a recovery in this action." The court denied this application to amend and the ruling is now assigned as error. Exhibit "F" referred to in this proposed amendment is the check of August 16, 1907, heretofore referred to and set out in full in this opinion. The contention of the appellant, that this check was a receipt and satisfaction of any and all claims the plaintiff might have against the defendant company, is based upon the following

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language contained in such receipt, "Above Frank Heath hereby releases all claims of whatsoever nature against Potlatch Lumber Company."

Whether this proposed amendment would have been sufficient as a plea in accord and satisfaction may be seriously doubted, but whether sufficient or not, the only evidence which would in any way tend to support such plea was the receipt itself, and this was offered by the plaintiff; and having been offered by the plaintiff, if it established the fact that the claim for which plaintiff's action was instituted had been settled and paid, the plaintiff could not have recovered a judgment even though such plea had not been interposed, and the defendant was in no way prejudiced by reason of the court's refusal to permit such amendment to be made. We are satisfied, however, that the evidence clearly shows that it was not the intention of either the plaintiff or the defendant that this receipt should operate as a receipt in full for any claim for damages made by the plaintiff against the defendant.

According to the contention of the defendant, no payment was made on account of any damages; the payment covered by this check was rather a gratuitous gift to the plaintiff because of his need, and was not compensation for services or in lieu of any damages claimed; and upon the other hand, if a compromise agreement was made as claimed by the plaintiff, and this check was given for the purpose of carrying out such compromise agreement, then the release clause in the check would not preclude the plaintiff from recovering the amount fixed by the compromise agreement, especially when the defendant made default in carrying out its part of such agreement. In other words, if a compromise agreement was made as claimed by the plaintiff, and the defendant company made default in carrying out its part of such agreement, then the fact that the defendant wrote the release clause in the check given as a payment upon such compromise agreement would not operate to discharge the plaintiff's claim as agreed upon by such compromise agreement.

It was apparent that the defendant company did not consider the language of this check to be a release of any claim

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Points Decided.

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of the plaintiff against the defendant company, for on September 30th the defendant company sent to the plaintiff another check for wages, which contained a similar provision; and if it had been the intention of the defendant company in delivering the check of August 16th, and its acceptance by the plaintiff, that the same should operate as a release of all claims against the defendant for damages, then there would have been no reason and no consideration for the check of September 30th.

While it is true, as a proposition of law, that where payment is made upon an unliquidated claim for an amount less than that claimed, upon condition that the amount so paid is to be in satisfaction of said claim as a whole and the acceptance of the same constitutes an accord and satisfaction, yet this principle of law has no application whatever to the facts of this case, for, as the evidence shows, the payment of August 16th was made for an amount agreed upon by the parties as a partial payment, to be continued monthly until the plaintiff was able to resume work, and was not made or accepted in satisfaction of any claim made by the plaintiff for damages. In such case the principles of law applicable to accord and satisfaction do not govern. (1 Cyc. 305.)

Judgment *affirmed*. Costs awarded to *respondent*.

Sullivan, C. J., and Ailshie, J., concur.

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(April 11, 1910.)

JACKSON HARR, Respondent, v. JAMES KIGHT, HENRY KIGHT and BERT KIGHT, Appellants.

[108 Pac. 539.]

DEFAULT—SETTING ASIDE.

(Syllabus by the court.)

1. An application to open and set aside a default is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused, the order will not be disturbed on appeal.



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Argument for Respondent.

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2. To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and in addition thereto that such person has a meritorious defense to such action.

3. Showing in this case examined, and held that the trial court did not abuse its discretion in refusing to open and set aside a default.

APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

An application to open and set aside a default. Application denied. Defendant appeals. *Affirmed*.

I. N. Smith, and Clay McNamee, for Appellants.

The default is filed April 6, 1909, but it is conceded that there was no entry of this default in the clerk's record at the time the demurrer was filed on April 15, 1909. Anyway, the misdirection of the letter containing the money sent by client to attorney was the cause of any further affirmative action not being taken for client, except the filing of the demurrer.

The Smith family is so numerous, their initials so varied and intermingled, that courts should take judicial knowledge thereof, and should also hold that errors in initials of any man by the name of "Smith" are sufficient to excuse an ordinary man for any default arising therefrom. (*Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.)

The attorney for appellants relied upon the record of the clerk as not showing any default at the time the demurrer was filed, and thereafter repeatedly requested from the clerk the information shown by the affidavit at folio 144, also 155, 156. (Not denied.) He had the right to rely upon this information. (*Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. 472, 34 Pac. 909.)

S. O. Tannahill, and Geo. W. Tannahill, for Respondent.

"An application to vacate a default judgment is addressed to the discretion of the trial court, and such discretion will

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not be reviewed unless abused." (*Baker v. Knott*, 3 Ida. 700, 35 Pac. 172; *Pease v. County of Kootenai*, 7 Ida. 731, 65 Pac. 432; *Sandstrom v. Smith*, 11 Ida. 779, 84 Pac. 1060.)

STEWART, J.—An action was commenced by the respondent against the appellants in the district court of Nez Perce county to obtain a perpetual injunction restraining the appellants from interfering with a certain water right claimed by respondent and certain water-pipes and reservoir, and for damages. The complaint was filed with the clerk on February 15, 1909. Summons was issued and served personally upon the defendants in Nez Perce county on February 16, 1909. Upon April 6, 1909, the default of the defendants for want of an answer was entered by the clerk. On April 15, 1909, a general demurrer was filed to the complaint signed by I. N. Smith, attorney for defendants. On May 12, 1909, the judge of the district court filed his findings of fact, conclusions of law and a decree which, among other things, recited: "This cause came on to be heard on the 26th day of April, A. D. 1909, before the court without a jury, the plaintiff appearing in person and with his attorneys, S. O. Tannahill and Geo. W. Tannahill, Esqs., the defendant having been duly and regularly served with summons as by law required, and having failed to appear and answer or demur, their default for not answering having been duly entered, as required by law, the court having heard the evidence on the part of the plaintiff, and duly considered the same, and having heretofore made its findings of fact and conclusions of law." Then follow the findings and the decree in favor of the plaintiff, quieting the plaintiff's title to certain water rights, right of way and water flowing through a certain pipe and reservoir, and for a perpetual injunction. On June 12, 1909, a motion to set aside the default was made, supported by the affidavits of James Kight and I. N. Smith, and accompanied with an answer to the complaint. In the affidavit of Kight it is stated that he had stated the facts of his case to I. N. Smith, his counsel, and was advised by him that he had a good and sufficient defense and referred to his answer, and

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as an excuse for his failing to appear and suffering default to be entered against him and the other defendants, he stated that the defendants had employed the firm of Johnson & Stookey as their counsel, and that because of some misunderstanding, the affiant received no notice of the setting of the case for trial, nor did he have an opportunity to appear at the trial for that reason; that he was anxious to appear and would have appeared had he received notice, and that it was never his intention to concede the rights claimed by plaintiff nor to admit that the plaintiff was entitled to the waters in controversy; that he was delayed further from the fact that he engaged I. N. Smith to represent his interest, and agreed to send him a certain sum of money, and that he sent the money on April 21st, by postoffice order, but because of miscarriage the same was not received by his attorney.

In the affidavit of I. N. Smith, he swears that he is attorney for the defendants and was first consulted by the defendants on April 14, 1909, and partially engaged as attorney, but before he would take any step other than to file a demurrer, he should be paid the sum of twenty-five dollars, and on April 15th he filed a general demurrer; that at that time the register of actions did not show any entry of default; that after that he waited to hear from his client with remittance and did not receive any letter until about June 5, 1909; that as a matter of fact his client on April 21, 1909, purchased a postoffice order at Lenore, Idaho, in favor of said Smith, and wrote a letter on that day and placed the letter and postoffice order in an envelope and erroneously addressed the letter to N. P. Smith at Lewiston, Idaho; that such letter was advertised, and on May 17, 1909, was sent to the dead letter office, and was remailed to the sender on June 4th. In the meantime Kight had informed his attorney that he had sent the money and asked for an investigation, and upon receiving assurances that the money had been sent, said Smith as attorney served the answer and the affidavit of Kight to set aside the default; that in his opinion there was a complete and perfect defense to the cause of action set forth in the complaint, and that Kight had always expressed his desire to

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Opinion of the Court—Stewart, J.

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contest said action and protect his interests and did not concede the rights of the plaintiff. On April 28th he wrote his client informing him of the condition of the case, but because of his poverty he was unable to come to Lewiston and look after the case, but did come in about a week prior to May 28th, and tried to get his counsel to go ahead with the case, but counsel insisted on the payment of the twenty-five dollars.

Counsel further states in his affidavit that he was informed by his client that his client's former attorneys, Johnson & Stookey, had attempted to settle the cause without appearance by answer or otherwise in court, and sent to their client a certain stipulation which he refused to sign; that he depended upon his counsel to see that no default was taken against him, and that he did not know that default had been taken until he was informed by affiant; that affiant was not employed in the said case until after the default was entered.

In opposition to the motion to set aside the default, affidavits were made by Jackson Harr and S. O. Tannahill, one of his counsel. Mr. Harr swears that after service of summons had been made in said case, Johnson & Stookey, representing the defendants, met with the plaintiff and his attorneys and drew up a stipulation, and that the defendants were advised by their attorneys that their rights were fully protected, and that they should sign the stipulation and consent that a judgment be entered accordingly; that they had no other or further defense in the action; that the defendants disregarded the advice of their attorneys and refused to sign such stipulation; that the default in said case was entered on April 6, 1909, and on April 26th the plaintiff appeared in person and with his attorneys and submitted his proof; that I. N. Smith, who afterward became attorney for defendants, was advised of the entry of the default and was advised that the evidence had been taken, and a judgment and decree drawn and that such decree was served upon said I. N. Smith and was held until May 8th before the same was signed or filed; that the court adjourned on May 17th, and no application or motion or pleading had been filed for the purpose of setting aside the default, and the findings of fact and the con-

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clusions of law and the decree were regularly made and filed on May 8, 1909. Accompanying this affidavit is the stipulation referred to, from which it appears that the findings and decree are in accordance therewith.

In the affidavit of Mr. Tannahill, he swears that on April 10, 1909, at the request of the defendants and their counsel, Johnson & Stookey, affiant met one of the defendants and P. E. Stookey, of said firm, for the purpose of entering into a stipulation and settlement of the matters in controversy, and that a stipulation was drawn up which is the same stipulation made a part of the affidavit of Jackson Harr; that said Stookey advised the defendants that they should sign said stipulation and settle the matters in controversy, as they had no substantial defense to said action, and that affiant and Stookey separated with such understanding that said stipulation would be signed and approved; that I. N. Smith, who afterward became one of defendant's counsel, was advised that no answer had been filed and that affiant intended to take judgment against the said defendants, and that said Smith stated he did not know what action he desired to take, or words to that effect; that on April 26th affiant caused the plaintiff to appear, and evidence was taken and a decree thereafter drawn and presented to the court for signing, and affiant served a copy of said findings of fact, conclusions of law, and decree on I. N. Smith, who now appears as attorney for the said defendants, and that said findings and decree were handed to said Smith on April 27, A. D. 1909; that no application was made to set aside the default and on May 8, 1909, the findings and decree were signed and filed.

Upon this showing, the trial court denied the application of the appellants to set aside the default and judgment. From that order this appeal was taken.

The only question presented on this appeal is: Did the trial court abuse its discretion in refusing to set aside the default? This court has decided so often that it seems supererogation to repeat that "An application to set aside and vacate a judgment is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused,

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Opinion of the Court—Stewart, J.

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the order will not be disturbed on appeal." (*Culver v. Mountain Home Electric Co.*, 17 Ida. 669, 107 Pac. 65.)

Under the provisions of Rev. Codes, sec. 4229, a party may be relieved from a judgment or order taken against him through mistake, inadvertence, surprise, or excusable neglect, and this court in a number of cases has held that a defendant making application to open a default must not only show that the default was entered against him through his mistake, inadvertence, surprise or excusable neglect, but must also show sufficient facts from which it appears that he has a good defense. (*Holzeman v. Henneberry*, 11 Ida. 428, 83 Pac. 497.) To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and in addition thereto, that such person has a meritorious defense to such action, and if the ruling upon the showing made does not show an abuse of legal discretion, then the order will not be reversed.

According to the showing made, the complaint was filed February 15, 1909; summons served February 16, 1909. After service of summons the defendants employed counsel, and the counsel so employed met counsel for respondent and entered into a stipulation, in accordance with which it was agreed judgment should be entered, and after making such stipulation, counsel for defendants did not file a demurrer or answer or further appear in said action. The respondents declined to accept the settlement made or the advice of their counsel. On April 6, 1909, no appearance having been made by defendants, their default was entered. On April 15th a general demurrer was filed in said cause by I. N. Smith, who had been secured as counsel for defendants instead of Johnson & Stookey, their former counsel. The case came on for trial before the court on April 26, 1909, the record reciting that defendants were in default and failed to appear and answer. On May 12, 1909, the judge filed his findings of fact and conclusions of law and decree. The only excuse appearing in the affidavits, upon which the trial court was asked to set aside such default, is the showing that defendants con-

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Opinion of the Court—Stewart, J.

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sulted I. N. Smith and partially employed him as their attorney on April 14, 1909, but that he declined to take any step other than file a demurrer until he was paid a certain fee demanded by him; and that while as a matter of fact his client remitted him through postoffice order such fee on April 21, 1909, he did not receive the same until about June 8, 1909. It is apparent from this record that Johnson & Stookey were defendants' counsel after their first employment up until the time defendants employed I. N. Smith on April 14th. The summons was served in Nez Perce county on February 16th; consequently the defendants were in default on February 27th, yet the default was not entered until April 6th. When the demurrer was filed on April 15th by I. N. Smith, who was then acting for the defendants, such defendants were in default and the filing of the demurrer could not affect such default. (Rev. Codes, sec. 4174; *Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506.) It further appears that after I. N. Smith had partially been employed as counsel for the defendants, he was informed by counsel for plaintiff before judgment had been entered that said defendants were in default, and that plaintiff intended to take judgment against them, and that no appearance was then made on behalf of the defendants; and that after the trial was had on April 26th, a copy of the findings and decree was served upon said Smith as counsel for the defendants, yet defendants made no appearance in said cause, and that said findings and decree were held and not signed until May 8, 1909, or filed until May 12th; and yet defendants made no appearance or move to open or set aside said default. Under these facts, it would have been an abuse of discretion had the trial court sustained the motion to open such default. The defendants were guilty of such neglect and carelessness in protecting their own interest as under no ordinary circumstances could be imputed to an ordinarily careful man in a business matter.

If this court should reverse this case and hold that the trial court abused its discretion in refusing to open the default, then there would scarcely be a default judgment but that a sufficient showing could be made to set the same aside.

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Points Decided.

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Litigation would be delayed and prolonged and the statute fixing the time within which an answer or demurrer must be filed would practically be nullified. Taking this view, it is unnecessary to determine whether the answer stated a defense, because even if it should be found that such answer did state a meritorious defense, yet the utter failure of the defendants to make a sufficient showing of mistake, inadvertence, surprise or excusable neglect, necessarily leads to an affirmance of the judgment.

The judgment is affirmed. Costs awarded to respondent.

Sullivan, C. J., and Ailshie, J., concur.

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(April 12, 1910.)

**A. A. DARKNELL, Appellant, v. COEUR D'ALENE & ST.  
JOE TRANSPORTATION CO., LTD., Respondent.**

[108 Pac. 536.]

**COMMINGLING CAUSES OF ACTION IN ONE COUNT—JOINDER OF CAUSES  
OF ACTION—PRIVATE CORPORATION—ULTRA VIRES CONTRACT—ES-  
TOPPEL—PUBLIC POLICY—STATUTE OF FRAUDS.**

(Syllabus by the court.)

1. Where two or more causes of action are improperly united and commingled in one count in the complaint, the proper procedure to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts.

2. A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services on an implied contract to pay the reasonable value of such services.

3. Where D. entered into a contract with a corporation whereby it was mutually understood and agreed that in consideration of D. purchasing stock in the corporation and retaining and continuing his ownership in such stock of the corporation, the corporation would furnish him employment as assistant general manager as long as D. retained the ownership of such stock, at the same salary



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Argument for Appellant.

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that the corporation might or should from time to time pay to one W., its general manager, and D. entered into the employment of the corporation under such contract and continued in the service of the company for about three years, and thereafter sued the corporation to recover his wages at the agreed and stipulated price, the corporation will be bound to pay such salary as was agreed and stipulated, and will be estopped from setting up the plea of *ultra vires*.

4. ID.—In such case, where the services have already been rendered and the action is one merely to collect the salary already earned, the question as to the power of the corporation to repudiate the contract and discharge the employee does not arise and is not involved.

5. Sound public policy can never run counter to the principles of honest and fair dealing, and the rule of public policy cannot be invoked to defeat the recovery of an honest claim.

6. The statute of frauds (subd. 1, sec. 6009, Rev. Codes) will not prevent the recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by the employee during a period exceeding one year, simply because the contract was not reduced to writing.

7. A contract whereby a corporation agrees to employ D. at a specified salary so long as he continues to own and hold his stock in the corporation does not come within the purview of the statute of frauds (subd. 1, sec. 6009, Rev. Codes), on the ground that the same was not in writing, for the reason that such contract is capable of being fully performed, completed and terminated within a year.

APPEAL from the District Court of the Eighth Judicial District of the State of Idaho, for the County of Kootenai. Hon. Robert N. Dunn, Judge.

Action by plaintiff to recover wages as stipulated and agreed by contract. Judgment for defendant and the plaintiff appeals. *Reversed*.

R. E. McFarland, for Appellant.

Agreements like the one in this case are held to be definite and certain, and therefore binding. (*McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. 289, 32 N. E. 802; *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. 488, 46 N. E. 117, 35 L. R. A. 512;

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Argument for Respondent.

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*Stearns v. Lake Shore & M. S. Ry. Co.*, 112 Mich. 651, 71 N. W. 148; *Carter White-Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536; *Henderson v. Spratlen*, 44 Colo. 278, 98 Pac. 14, 19 L. R. A., N. S., 655.)

Where a corporation has entered into a contract in excess of its granted powers and has received the fruits or benefits of the contract, it is estopped from setting up the defense of *ultra vires*. (5 Thompson on Corp., par. 6016.)

Where the contract has been fully executed on either side, and the party so executing sues to recover the agreed consideration, the other party will be estopped from setting up the defense that the corporation had no power to make the contract. (5 Thompson on Corp., par. 6024; 29 Am. & Eng. Ency. of Law, 2d ed., 50; *Clement Bone & Co. v. Michigan Clothing Co.*, 110 Mich. 458, 68 N. W. 224.)

Robert H. Elder, for Respondent.

Under the terms of this agreement, as set out by plaintiff, it is clear that it was the intention of the parties that the agreement should continue in force for a longer period of time than one year. That being so, the contract is clearly within the statute of frauds. (2 Parsons on Contracts, p. 51; *Drummond v. Burrell*, 13 Wend. 307; *Herrin v. Butters*, 20 Me. 119; *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081.)

A verbal contract, which by its terms or by the understanding of the parties is not to be performed within a year, although subject to a defeasance by the happening of a certain event which might or might not occur within that time, is within the statute of frauds. (*Wilson v. Ray*, 13 Ind. 1; *Wash. Steam Packet Co. v. Sickles*, 5 Wall. 580, 18 L. ed. 550.)

The contract is *ultra vires* and against public policy. The law requires the control and management to be vested in a board of directors, but this contract would prevent any board of directors from removing the appellant, and would therefore prevent them from managing and controlling the corporate affairs. (*West v. Camden*, 135 U. S. 507, 10 Sup. Ct.

838, 34 L. ed. 254; *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162.)

Its tendency, if not its direct result, is to foist upon the stockholders officers not desired, to take from the assets moneys for salaries not earned, to deny to the officers in a business transaction of the corporation that freedom of judgment necessary to successful results. Contracts having such tendencies have generally been held void. (*Bliss v. Matteson*, 45 N. Y. 22; *West v. Camden*, *supra*; *Fuller v. Dame*, 18 Pick. 472; *Bollman v. Loomis*, 41 Conn. 581; *Woodruff v. Wentworth*, 133 Mass. 309; *Lum v. Clark*, 56 Minn. 278, 57 N. W. 662; Bishop on Contracts, sec. 525; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Bestor v. Wathen*, 60 Ill. 138; *Bensinger v. Kantzler*, 112 Ill. App. 293; *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.)

A contract which is made by a corporation, and which is unlawful and void because it is beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid, and the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover as on a *quantum meruit*, the value of that which the defendant has actually received the benefit. (*Pittsburg C. & St. L. R. Co. v. Keokuk Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; *Patten v. Hicks*, 43 Cal. 509; *Murphy v. DeHaan*, 116 Iowa, 61, 89 N. W. 100.)

Nothing that has been done under a contract of a corporation which is beyond the scope of its corporate powers can give validity to said contract. (*O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. 354, 46 L. ed. 636; *Penn. Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802; *Harrington v. Kansas City Cable Ry. Co.*, 60 Mo. App. 223; *Brighton v. Lake Shore etc. R. R. Co.*, 103 Mich. 420, 61 N. W. 550.)

AILSHIE, J.—This action was commenced for the recovery of judgment for services rendered by the plaintiff to the defendant corporation. An amended complaint was filed and a demurrer to that complaint was sustained. A second amended complaint was filed, and it was upon that complaint that the

## Opinion of the Court—Ailshie, J.

cause went to trial. It was alleged by the plaintiff that on the first day of April, 1905, he purchased thirty shares of the capital stock of the defendant corporation, and that he thereupon and on the same day entered into the contract with the defendant upon which this action is based. Paragraph 5 of the second amended complaint alleges the nature and character of the contract upon which the action is founded, and is as follows:

“That on, to wit, the first day of April, 1905, and after plaintiff had purchased said shares of stock, said plaintiff and defendant entered into an oral agreement, upon the terms whereof defendant agreed to employ and did employ plaintiff as the assistant general manager of said defendant, and agreed and promised to pay to plaintiff for his services as said assistant general manager, for such period of time as plaintiff should retain his said shares of stock, the same salary from time to time paid to and received by said J. C. White as such general manager, and thereupon, to wit, on the first day of April, 1905, plaintiff entered in the employ of said defendant under and by virtue of said oral agreement, and performed services for said defendant as such assistant general manager at the monthly salary of one hundred dollars (\$100), until the 6th day of October, 1905, when said defendant commenced to pay, and ever since said last-mentioned date to the present time, has paid to said J. C. White, as such general manager, the salary of three thousand dollars (\$3,000) per annum, by reason whereof and under the terms and conditions of said oral agreement plaintiff became and was entitled to receive for his services as assistant general manager the sum of three thousand dollars (\$3,000) per annum from the 6th day of October, 1905.”

It is further alleged that under and by virtue of the contract set out in paragraph 5 the plaintiff performed services for the defendant as assistant general manager from the first day of April, 1905, up to and including the 6th day of October, 1905, at the monthly salary of \$100, and that from the 6th day of October, 1905, up to and including the 6th day

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of June, 1908, the plaintiff performed services for defendant continuously as assistant general manager at the salary of \$3,000 per annum. Plaintiff alleges that the salary claimed by him is the same salary that the defendant was paying to its general manager, J. C. White, during the same period of time that plaintiff was in its employ, and that plaintiff was by the terms of his contract to receive the same compensation as the general manager might receive for the same period of time.

In addition to the foregoing allegations as to the nature of the contract, plaintiff also alleges in paragraph 6 "that said services were reasonably worth" the sums alleged and claimed by him in his complaint.

When the case came on for trial, the defendant filed a motion "to require plaintiff to elect as between two causes of action to proceed upon and to strike." The court appears to have sustained this motion, and made an order requiring the plaintiff "to elect between the two separate and distinct causes of action set forth in his complaint herein, and that all of said complaint relative to any cause of action other than the one plaintiff elects to retain in his complaint be stricken from said complaint." The plaintiff protested against this action, took his exception, and thereupon elected to proceed upon the contract as set out in his complaint for the recovery of a stipulated salary. The trial thereupon proceeded, and plaintiff called his first witness, and began to examine him, whereupon the defendant objected to the introduction of any evidence in the case "for the reason that plaintiff's amended complaint . . . as it now stands under the order of the court . . . does not state facts sufficient to constitute a cause of action." This motion was sustained by the court, and the plaintiff excepted, and has preserved the proceedings in a statement and bill of exceptions. This appeal is from the judgment.

It was contended by the defendant on its motion to require the plaintiff to elect, and is contended in this court, that the plaintiff had improperly commingled two separate and independent causes of action in one count. In other words, it is

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insisted that the complaint charged a pretended cause of action on the contract for a stipulated salary and also a pretended cause of action on *quantum meruit*. This contention seems to have been based on the fact that the plaintiff inserted in his complaint the allegation that the services were of the reasonable value of the amount alleged. If this contention be correct, still the proper method of reaching the objection would not be by motion to require the plaintiff to elect. The two causes of action would not be inconsistent. If improperly united and commingled in one count, the proper motion would have been to require the plaintiff to separately state his several causes of action. It is conceded, and the complaint so states, that the recovery sought was for a stipulated price for services rendered,—the services here rendered under contract. The only question which seems to arise in the case is whether the plaintiff could recover on a stipulated price or must recover on *quantum meruit*. The two theories are not inconsistent. Indeed, if the plaintiff should succeed in proving that he rendered the services and should be unable to prove that he had a contract for a specific salary, then he would be clearly entitled to recover the reasonable value of the services, provided his complaint contains a count on *quantum meruit*. Under the statute (subd. 1, sec. 4169) causes of action arising out of "contracts express or implied" may be joined. So a cause of action on an express contract for a fixed salary may be joined with a cause of action for the same service on an implied promise to pay the reasonable value thereof. (*Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213; *Estrella etc. Co. v. Butler*, 125 Cal. 232, 57 Pac. 980; *Olmstead v. Dauphiny*, 104 Cal. 635, 38 Pac. 505.)

It is argued, and the chief contention is made by respondent, that this contract is void, that as to the corporation it was *ultra vires*, and that it is also contrary to public policy, for the reason that it has the effect of divesting the directors and officers of their power of controlling and managing the business and affairs of the corporation. However sound this argument may be, and whatever merit it may contain, it is clearly inapplicable to the present status of this case and the

facts on which we must pass. The question of the power of the directors to discharge the appellant and absolve the corporation from a further continuance of the relation or longer recognizing the binding effect of the contract and accepting appellant's services under the contract does not arise in this case. Here, according to the allegations of the complaint, appellant continued for several years in the service of respondent under the terms of this contract, and the only question which arises now is the liability of the company to pay for the service already rendered. May he rest his right of recovery on the price fixed by the contract, or shall he be bound to base his recovery on the reasonable value of the services rendered? No dispute arises on this appeal as to the actual performance and acceptance of the service. The only question now involved is as to the measure of compensation; appellant claims the right to recover for services already rendered according to the terms of the contract, which terms have been fully performed on his part, while respondent repudiates the contract and denies any right of recovery thereunder. In our judgment, it is scarcely a debatable question. The validity and binding effect of the contract having been recognized until after the services have been rendered, the corporation will now be liable to pay in accordance with its terms if appellant succeeds in his proofs. The plea of *ultra vires* would not be available to the corporation in such case.

The contract is in no way violative of any theory or principle of public policy. Sound public policy can never run counter to principles of honest and fair dealing. This is wholly different from a case where the contract provides that the party shall be retained either for a fixed or an indefinite period as a trustee or elective officer of the corporation, or where the contract disables the corporation from carrying on its business, as was the case in *Glass v. Basin & Bay State Mill Co.*, 31 Mont. 21, 77 Pac. 302, and *Gibbs v. Cons. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979. The principles of honesty and fair dealing will not permit the company to escape liability to pay the appellant the agreed price after he has parted with his services on the agreement and under-

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standing that he should receive a stipulated salary. Had he been notified in advance that if he rendered the services he would only be allowed compensation in such sum as he could prove to be reasonable, he might have preferred to seek a better employment at a fixed and more remunerative salary. Whatever the binding effect of this contract might be for the future and with reference to services not yet rendered, it is the unmistakable legal duty of respondent to pay for past services in accordance with the contract as the same may be proven. (5 Thompson on Corp., secs. 6016, 6017.)

It is argued by respondent that plaintiff cannot recover under this contract for the reason that it was in violation of subd. 1, sec. 6009, Rev. Codes. That provision of the statute prohibits the introduction of oral evidence to prove an agreement that by its terms is to be performed within a year from the making thereof. The provisions of the statute are not applicable to the case in hand. This is not an action for specific performance or for damages on account of a breach of the contract, or concerning any unperformed portion of the contract or services to be rendered in the future. So far as the action in hand is concerned, it is an executed contract, just as much so as would be a contract between A and B for the performance of labor at five dollars per day, and which contract was entered into two years before the commencement of action by A for the recovery of his wages. We apprehend that A would not be prohibited proving the contract as to the wages he was to receive for the two years' services rendered, simply because the contract was not in writing. It would be quite a different proposition, however, if B had refused to furnish A the work, and A had sued B for a breach of the contract.

By a long line of authorities it is held that such a contract as this does not fall within the statute of frauds, for the reason that it was capable of being performed, and might have been fully performed and terminated, within a year, and that such contracts are not within the statute. (2 Page on Contracts, sec. 676; Wood on Frauds, sec. 270; *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70, 13 Am. St. 767, 10 S. W. 99;



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Points Decided.

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*L. & N. R. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. 467, 36 S. W. 181; *Sax v. Detroit etc. Ry. Co.*, 125 Mich. 252, 84 Am. St. 575, 84 N. W. 314; *Smalley v. Mitchell*, 110 Mich. 689, 68 N. W. 978; *Yellow Poplar Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Greene v. Harris*, 9 R. I. 407; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 590.)

In this case the contract was to be terminated on the sale by plaintiff of his stock in the corporation. His purchasing and continuing to hold the stock was the consideration for the contract, and on his making a sale of the stock, the agreement and likewise the employment would end. (*McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661.) The sale might have taken place the following day or any day during the year.

The judgment in this case must be reversed, and a new trial will be granted. Costs awarded to appellant.

Sullivan, C. J., and Stewart, J., concur.

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(April 13, 1910.)

J. W. BLAKE, Appellant, v. J. S. JACKS, Assessor, Respondent.

[108 Pac. 534.]

ANNEXATION OF A PART OF ONE COUNTY TO ANOTHER—PAYMENT OF INDEBTEDNESS—LIABILITY OF PART ANNEXED.

(Syllabus by the court.)

1. Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed.

2. Under the provisions of sec. 1963, Rev. Codes, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness.

3. Under the provisions of our statute, the indebtedness of a county becomes a burden upon all of the taxable property brought within the county after the creation of such indebtedness, as well

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Argument for Respondent.

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as upon the taxable property that was within the county at the date of the creation of the indebtedness.

APPEAL from the District Court of Nez Perce County, Second Judicial District. Hon. Edgar C. Steele, Judge.

Action to enjoin the assessor and tax collector from the collection of any tax for the payment of certain indebtedness of Nez Perce county that existed prior to the annexation of a part of Shoshone county thereto. Judgment for defendant. *Affirmed.*

Morgan & Morgan, for Appellant.

Under the constitution and statutes of Idaho, whenever a portion of a county is stricken off and annexed to another county, the portion so annexed does not become liable for, nor shall it be held to pay any part of, the indebtedness of the county to which it is annexed, which was contracted prior to said annexation. (Constitution, sec. 3, art. 18; Rev. Codes, sec. 1963; *Shoshone County v. Profitt*, 11 Ida. 763, 84 Pac. 712.)

To hold that the part of the common-law rule requiring this annexed portion to shoulder the burden of the debts of Nez Perce county, contracted prior to annexation, has not been abrogated and is still in force, and that the statutory rule requires it to continue to bear the burden of the debts of Shoshone county, contracted prior to segregation, is to hold that the common-law rule is abrogated to the material advantage of Shoshone county, as it now exists, and is still in full force and effect to the material advantage of Nez Perce county, as it existed prior to the annexation, but the injustice of such a construction to such segregated and annexed territory is very apparent.

D. C. McDougall, Attorney General, J. H. Peterson, Assistant, and Dwight E. Hodge, County Attorney for Nez Perce County, for Respondent.

“Where a county is enlarged by annexation of new territory, the property thus brought within the corporate limits

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Opinion of the Court—Sullivan, C. J.

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will be subject to taxation to discharge the pre-existing indebtedness of the old corporation." (*Watson v. Commrs. of Pamlico County*, 82 N. C. 17; *Chicago, St. P. M. & O. R. Co. v. Cuming County*, 31 Neb. 374, 47 N. W. 1121; *Lake Shore & M. S. Ry. Co. v. Smith*, 131 Ind. 512, 31 N. E. 196.)

"Debts of a municipality contracted before an addition become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute." (28 Cyc. 222 et seq.; *Blanchard v. Bissell*, 11 Ohio St. 96; *Stilz v. Indianapolis*, 55 Ind. 515; *United States v. Memphis*, 97 U. S. 284, 24 L. ed. 937; *Dillon's Mun. Corp.*, 3d ed., secs. 63, 185; *Smith's Mun. Corp.*, sec. 423; *Donahue v. Morgan*, 24 Colo. 389, 50 Pac. 1041; *Madrey v. Cox*, 73 Tex. 538, 11 S. W. 541; *Cash v. Douglasville* 94 Ga. 557, 20 S. E. 438; *Gottschalk v. Becher*, 32 Neb. 653, 49 N. W. 715; *Pence v. Frankfort*, 101 Ky. 534, 41 S. W. 1011.)

The same rule extends to counties as well as cities. (*Commrs. of Laramie County v. Commrs. of Albany County*, 92 U. S. 307, 23 L. ed. 552.)

SULLIVAN, C. J.—An act was passed by the legislature in 1903 (see Sess. Laws 1903, p. 209) which segregated from Shoshone county a portion of such county and annexed it to Nez Perce county, and this action is brought to test the right of Nez Perce county to levy and collect taxes on property in said annexed portion for the purpose of paying the principal or interest of warrants or bonded indebtedness created by and existing against said county prior to the annexation.

The facts plead in the complaint were sufficient to put in issue the right of Nez Perce county to levy and collect taxes on the annexed territory for the purpose of paying the indebtedness of Nez Perce county, existing at the time of the annexation. The court sustained a general demurrer to the complaint and entered judgment of dismissal, the plaintiff having declined to plead further, and the appeal is from said judgment. The sustaining of the demurrer and entering judgment of dismissal is assigned as error.

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It is contended that since this court held in *Shoshone County v. Profitt*, 11 Ida. 763, 84 Pac. 712, that the portion of Shoshone county segregated therefrom and attached to Nez Perce county must pay its ratable portion of the indebtedness of Shoshone county, and that Nez Perce county as it existed at the time of the annexation was not liable for any part of that indebtedness, it would be unjust and inequitable now to require the segregated and annexed portion to pay its proportionate part of the indebtedness of Nez Perce county that existed at the time of the annexation. In the case of *Shoshone County v. Profitt*, *supra*, it was held by a majority of this court, under the provisions of sec. 3, art. 18, of the state constitution, that whenever any part of a county is stricken off and attached to another county, the part stricken off must pay its ratable proportion of all of its then existing liabilities, to the county from which it is taken, and that the county to which it is attached was not liable to pay any of such indebtedness, and that is the law of that case.

In support of counsel's contention that it would be unjust and inequitable to require the annexed portion to pay its proportionate share of the mother county's indebtedness, and also its share of the county's indebtedness to which it is annexed, sec. 1963, Rev. Codes of 1909, is cited, which provides that the faith, credit and all taxable property within the limits of a county, as it was constituted at the time the indebtedness was contracted or incurred, are and must continue pledged for the payment of the same, and that that being true, Nez Perce county, as it existed before the annexation must and ought to pay all of the then existing indebtedness of the county.

The provisions of that section pledge the faith, credit and taxable property within the limits of a county as it was constituted at the time of incurring the indebtedness, to the payment of such indebtedness. But it was not intended by such provisions to exempt any taxable property that was brought into the county after the indebtedness was incurred from the payment of its ratable share of such indebtedness. The pledge of property then in the county to the payment of

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Opinion of the Court—Sullivan, C. J.

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indebtedness was not intended to release other taxable property within such county from taxation for that purpose. Where it is not prohibited by statute, the natural and legal result of annexation of one portion of a county to another is that such annexed portion must pay its ratable share of the indebtedness of the county to which it is annexed.

It was held in *Watson v. Commissioners of Pamlico Co.*, 82 N. C. 17, that where a county is enlarged by annexation of new territory, the property thus brought within the corporate limits will be subject to taxation to discharge the pre-existing indebtedness of the old corporation. In the course of that decision, the court cites *Commrs. of Currituck v. Commrs. of Dare*, 79 N. C. 565, and states that the court in that case cites with approval the doctrine laid down in 1 Dillon on Municipal Corporations, sec. 123, where it is stated that where a new county is created out of the territory of an old county, or if a part of its inhabitants or territory is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, the latter will be entitled to all of the property and be solely answerable for all of the liabilities, and says:

“The plaintiffs can derive no support to their claim of exemption from the decision in *Currituck v. Dare*, *supra*, since the liability of all the taxable property in the county of Dare, as constituted, to assessment to meet its obligations is recognized, while so much as is taken from Currituck by the express terms of the enactment is additionally charged with its ratable share of the debt of the latter incurred for internal improvement.”

That case is clearly against the contention of the appellant. The case of *Chicago St. P. M. & O. Ry. Co. v. Cuming Co.*, 31 Neb. 374, 47 N. W. 1121, involved the question whether certain property was exempt from taxation to pay the debts of the county to which it was annexed that existed prior to the annexation. The court disposed of that contention as follows:

“If the position contended for by the plaintiff should be sustained, then only such property as was within the county

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Opinion of the Court—Sullivan, C. J.

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when the bonds were voted would be liable for the payment of the same. This, however, is not the law. The voters of a county, when voting bonds, assume a burden, not only for themselves, but for all the property owners in the county; and, in effect, agree that the county shall pay the bonds, with lawful interest thereon. This applies to all taxable property in the county, whether in the county when the bonds were voted, or such as may be brought therein afterward."

In *Lake Shore & M. S. Ry. Co. v. Smith*, 131 Ind. 512, 31 N. E. 196, the court said:

"The general and well-settled rule is that, where the territorial boundary of a body politic or corporation is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner and to the same extent as property previously included within the corporation; and this is true, even though such taxation be for the purpose of paying pre-existing debts of the corporation."

It is held in 28 Cyc., p. 222 et seq., as follows:

"Debts of a municipality contracted before an addition become a burden upon the added territory as well as upon the original territory, unless it is otherwise provided by statute."

The rule there laid down was applied to cities and towns, and the same rule extends to counties as well as cities. (*Comms. of Laramie Co. v. Comms. of Albany Co.*, 92 U. S. 307, 23 L. ed. 552.)

We arrive at the conclusion that the property in the annexed portion of the county is liable for its proportionate share of the indebtedness of Nez Perce county as it existed before the annexation. The judgment of the trial court must therefore be sustained, and it is so ordered, with costs in favor of respondent.

Stewart and Ailshie, JJ., concur.

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Points Decided.

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(April 14, 1910.)

FRANK BERNARDI, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

[108 Pac. 542.]

RAILROAD—DUTY TO FENCE.

(Syllabus by the court.)

1. Under the provisions of Rev. Codes, sec. 2815, it is the duty of every railroad company operating any steam or electric railroad in this state to erect and maintain lawful fences on each side of its road where the same passes through, along, or adjoining inclosed or cultivated fields or inclosed lands.

2. Until such fences shall be made and maintained, such corporation shall be liable to pay all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road, regardless of whether the person operating or in charge of such engine or cars was negligent or not.

3. The language used in sec. 2815 as follows: "where the same passes through, along or adjoining inclosed or cultivated fields or inclosed lands," refers to country districts or where a railroad runs along, adjoining or through cultivated fields or inclosed lands, and was not intended to apply to municipalities or towns whether incorporated or not, unless such town was so extended as to include cultivated fields or inclosed lands other than residence lots.

4. It is clearly within the power of the legislature as a police regulation to require railroad companies to fence their track, and it is for the judgment of the legislature whether such duty shall be extended to the requirement that a railroad shall fence its road in municipalities or towns or in rural sections where the lands are not cultivated or inclosed, such as the open prairie, sage-brush and timber lands not cultivated or inclosed.

5. *Held*, under the evidence in this case that the appellant was not required to fence its road where the animal for which damages were sought entered upon the track.

6. A railroad company is not required, under the provisions of sec. 2815, to fence its road where the same runs through a narrow canyon with a public traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track, and residences and stores occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on the other side, and there

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Argument for Appellant.

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are no cultivated fields or inclosed lands through, along or adjoining which such road runs at the place of the accident.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

An action to recover damages for the killing of a cow by a train operated by a railroad company, where the road was not fenced. Judgment for plaintiff. Defendant appeals. *Reversed.*

E. J. Cannon, and Featherstone & Fox, for Appellant.

Where it is impracticable or impossible for a railroad company to erect and maintain fences along its right of way, it will be exonerated from so doing. So it is uniformly held that a railway need not fence its depot grounds, and this is read into the statute by the courts as an exception to its application. (*Swanson et al. v. Melton* (Tex. App.), 17 S. W. 1088; *Beckdott v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686; *Foster v. Kansas City Southern Ry. Co.*, 112 Mo. App. 67, 87 S. W. 57; 3 Elliott on Railroads, p. 442, par. 1195.)

Where it would be unlawful to erect and maintain such fences a further exception is read into the statute. So a railroad may not fence public streets or highways or crossings, or public grounds or streets. (*Greely v. St. Paul, M. & M. Ry. Co.*, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179; *Ft. Wayne etc. Ry. Co. v. Herbold*, 99 Ind. 91; *Jeffersonville, M. & I. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 299; *Lake Erie & W. R. Co. v. Rooper*, 13 Ind. App. 600, 41 N. E. 470; *Rippe v. Chicago, M. & St. P. Ry. Co.*, 42 Minn. 34, 43 N. W. 652, 5 L. R. A. 864.)

A railroad is exonerated, without express exception contained in the statute, from erecting and maintaining such fences, where the public convenience demands that a particular portion of its road be left unfenced. (*Atchison, T. & S. F. Ry. Co. v. Shaft*, 33 Kan. 521, 6 Pac. 908; *Greely v. St. Paul, M. & M. Co.*, *supra*; *Hilleman v. Gray's Point Terminal Ry. Co.*, 99 Mo. App. 271, 73 S. W. 220.)



Walter H. Hanson, for Respondent.

The law clearly requires that a railway must provide fences and cattle-guards, or it will be liable for all stock killed regardless of negligence, and a similar statute has been upheld by this court in the case of *Patrie v. Oregon S. L. Ry. Co.*, 6 Ida. 448, 56 Pac. 82; also in *Johnson v. Oregon S. L. Ry. Co.*, 7 Ida. 355, 63 Pac. 112, 53 L. R. A. 744.

There is nothing in the record to show that the railroad company could not build a fence along their right of way without interfering with the operation of the road, and it is incumbent upon the appellant to show this fact by competent proof, if they wish to avoid the duty imposed upon them by statute. (*Lake Erie & W. R. Ry. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.)

A mere private convenience of the company of increased cost of construction is not sufficient to relieve the company from its duty to fence (Elliott on Railroads, sec. 1194); nor will any private convenience on the part of individuals be sufficient to absolve the company from fencing. (*Atchison, T. & S. F. Co. v. Shaft*, 33 Kan. 521, 6 Pac. 908.)

Counsel claim that the appellant is not obliged to erect fences or cattle-guards in Black Bear or any other town. We cite the following authorities in opposition thereto: *Coyle v. C. M. & St. P. R. Co.*, 62 Iowa, 518, 17 N. W. 771; *Cox v. Minn. S. S. M. & A. R. Co.*, 41 Minn. 101, 42 N. W. 924; 3 Elliott on Railroads, 2d ed., sec. 1195, p. 442; *Young v. Hannibal etc. Co.*, 79 Mo. 336; *Atchison, T. & S. F. R. Co. v. Shaft*, *supra*.

STEWART, J.—This action was commenced to recover damages for the value of a cow killed by appellant company in the operation of its railroad. The cause was tried to a jury in the district court and a verdict returned for the plaintiff. This appeal is from the judgment.

This appeal must be determined by answering the question: Was it the duty of the appellant company to fence its railroad track at the point where the cow entered upon said track?

## Opinion of the Court—Stewart, J.

Rev. Codes, sec. 2815, provides:

“Every railroad company operating any steam or electric railroad in this state, shall erect and maintain lawful fences not less than four feet high on each side of its road, where the same passes through, along or adjoining inclosed or cultivated fields or inclosed lands, with proper and necessary openings and gates therein, and farm crossings; and also construct and maintain cattle-guards at all highway crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules or other animals from getting on the railroad.

“Until such fences, openings, gates, farm crossings and cattle-guards shall be duly made and maintained, such corporation shall be liable to pay all damages which shall be done by its agents, engines or cars, to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or inclosures occasioned in either case by the failure to construct or maintain such fences, or cattle-guards, regardless of whether the persons operating or in charge of such engines or cars were negligent or not. But after such fences, gates, farm crossings and cattle-guards shall be duly made and maintained, such corporation shall not be liable for any such damages unless negligently or wilfully done.

“If any corporation aforesaid fail, neglect or refuse for and during the period of three months after the completion of its road through or along the fields or inclosures hereinbefore named, to erect and maintain any fence, opening gates, farm crossings or cattle-guards as herein required, and after having received not less than thirty days’ notice requiring them so to do, then the owner of such fields or inclosures may erect and maintain such fences, opening gates, farm crossings and cattle-guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction, the full value of the same: *Provided*, That no recovery can be had on account of stock injured or killed which came upon said highway by reason of failure to keep such gates closed.”

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Opinion of the Court—Stewart, J.

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This statute makes it the duty of a railroad company to erect and maintain lawful fences on each side of its road "where the same passes through, along or adjoining inclosed or cultivated fields or inclosed lands." The penalty fixed by the statute for failure to erect and maintain such fences is twofold: First, the company is made liable to pay all damages which shall be done by its agents, engines, or cars to the animals named in the statute, "regardless of whether the persons operating or in charge of such engines or cars were negligent or not"; second, if the company neglect or refuse, for and during the period of three months after the completion of its road, "through or along the fields or inclosures hereinbefore named, to erect and maintain any fence, . . . after having received not less than thirty days' notice requiring them so to do, then the owner of such fields or inclosures may erect and maintain such fences, . . . and shall thereupon have a right to sue and recover from such corporation . . . the full value of the same."

The statute, of which this section is a part, was approved March 13, 1907, and this section was intended to be a substitute for sec. 2680 of the Rev. Stat. which had previously been held to be unconstitutional. (*Catril v. Union Pacific Ry. Co.*, 2 Ida. 576, 21 Pac. 416.) The language, however, of this section, with reference to requiring a railroad company to fence, is very similar to the language found in sec. 2679, Rev. Stat., now sec. 2814 of the Rev. Codes; and it may be questionable whether or not the later act does not also repeal sec. 2814 of the Rev. Codes:

In the case of *Johnson v. Oregon S. L. Ry. Co.*, 7 Ida. 355, 63 Pac. 112, 53 L. R. A. 744, this court had under consideration sec. 2679, *supra*, and held:

"Under the authorities, we do not feel authorized to hold that the statute requires fencing merely for the protection of adjoining land owners. When the statute was enacted, Idaho was a sparsely settled territory. Large sections were unsettled, with practically no cattle or stock running at large. The legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the

territory, and only required it in the settled portions, where horses and cattle would be found in large numbers. When we passed into statehood through the provisions of the constitution, we continued the statute in force. We cannot conclude that the legislature exercised this police power, which is so necessary for the protection of human life and private property, for private abutting or contiguous land owners only, but must conclude that it was enacted for the good of the general public." And the court quotes with approval from *Patrie v. Oregon S. L. R. R. Co.*, 6 Ida. 448, 56 Pac. 82, as follows:

"If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of road passes through or along or abuts upon, or is contiguous to private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute as applied to the facts of this case is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track except when and where a private person may fence his land would be injecting language into said section that is not found there, and could not be put there by a fair implication and reasonable construction."

By the language, "inclosed or cultivated fields or inclosed lands," as used in this section the legislature clearly had in mind rural or country districts where the railroad runs through, along or adjoining inclosed or cultivated fields or inclosed lands, and did not intend to make such section apply to municipalities or towns, whether incorporated or not, unless such town was so extended as to include fields or inclosed

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Opinion of the Court—Stewart, J.

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lands other than town lots, or to a railroad passing along or in front of town lots or inclosed lots used for residence purposes only. Had the language of this section been general and specified, "That every railroad company operating any steam or electric railroad in this state shall erect and maintain lawful fences not less than four feet high on each side of its roadbed," then the statute would have applied to the road where it runs through municipalities and towns, whether incorporated or not; and the question then might arise whether by such language it was the intention of the legislature, or whether it was in the power of the legislature, to require the railroad company to fence its road where it would be impracticable or impossible, or where it would greatly inconvenience the public or materially interfere with the operation of such road. But these objections clearly do not apply to the provisions of the statute, if it is construed as the legislature certainly intended it to be, that is, as applicable to cultivated or inclosed lands. When the legislature used this language, it did so with the purpose and intention of making said section apply to a road running through, along or adjoining cultivated fields and inclosed lands, and as said by this court in *Johnson v. O. S. L. Ry. Co.*, *supra*, "The legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the territory, and only required it in the settled portions," and by the language used in sec. 2815, it is clear that the legislature was enacting said section for the protection of the public in rural and farm communities, and that the legislature did not intend to make said section applicable to municipalities and towns.

This court would not be justified in reading into the statute language which the legislature did not put there or extending the construction of the language so as to embrace conditions clearly not intended by the legislature. It is clearly within the power of the legislature as a police regulation to require railroad companies to fence their track, and it is for the judgment of the legislature whether such duty shall be

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extended to the requirement that a railroad shall fence its road in municipalities or towns or in rural sections where the lands are not cultivated or inclosed, such as the open prairie, sage-brush and timber lands not cultivated or inclosed; and until the legislature does so provide, damages cannot be recovered for livestock killed upon a railroad track by agents of the company in operating its road without proving negligence. In other words, the failure to fence will not supply the proof of negligence unless it be shown that the animal killed entered upon the track at a place where the law requires the company to fence. We think this construction is clearly authorized by the further provisions of this section with reference to the right of an owner of adjoining fields and inclosures to notify the company to erect and maintain such fence, and upon failure giving such owner the right to erect such fence and sue and recover from such corporation the value thereof, for in this latter provision the legislature refers to the road "through or along the fields or inclosures," and clearly used such language with reference to rural sections where lands were inclosed as settled, cultivated or improved, such as farm lands, pastures, orchards and other sections under inclosure. (*Edwards v. Hannibal & St. Jo. R. Co.*, 66 Mo. 567.)

The statute of Missouri, under construction in the latter case, was similar to the Idaho statute, except it also specified "open prairie" in addition to where the road passed "through or along cultivated fields and inclosed lands," and in that case the court says: "It is patent from the phraseology employed in this section that it was intended to apply only to farming lands and the open prairie, and not to lands included within the limits of any incorporated town or city."

So, we conclude that by the language used the legislature intended to make such section apply to farm lands, inclosed and cultivated lands, and not to municipalities or towns, whether incorporated or not, or other sections not cultivated or inclosed, unless the lands included fields or inclosed lands other than town lots. This brings us to a consideration of the evidence in this case for the purpose of ascertaining

whether the facts bring the case within the provisions of this statute.

A branch of the Northern Pacific Railroad extends from Wallace, Idaho, to Burke, Idaho, and passes through a very narrow canyon with high precipitous mountains on either side. Along the west side of the railroad extending up this canyon is a wagon road used by the public in passing up and down said canyon. The width of the railroad right of way or the public road is not shown by the evidence. In the vicinity where the animal in question was killed the canyon is very narrow, the wagon road occupying almost the entire space between the end of the railroad ties and the foot of the mountain on the west. To the east of the railroad the houses of the residents of Black Bear, an unincorporated village, are constructed abutting against the foot of the mountain and reaching to within eight to thirteen feet of the railroad track. The evidence does not show that there are any laid-out highways across the railroad track. There is a crossing shown by the evidence just above where the accident occurred, but whether a public highway it does not appear. The railroad track in this canyon is nowhere fenced. The animal injured was kept by the plaintiff in his front yard in Black Bear; the front fence of his inclosure was about thirteen feet from the railroad track. The cow strayed from this inclosure and went upon the railroad and was on the track near the front of a store which was generally recognized as a waiting place for the railroad trains, postoffice and station. There are no cultivated lands in this canyon near where the accident occurred. Some of the residents have their houses inclosed, but it is clearly not a rural or country district or a place where the railroad company was required to fence its track, under the statute involved in this case. Whether, if the language of the statute had been general, it would have been possible to fence the road at the place where the animal in question entered upon the track without greatly inconveniencing the public and preventing the public passing from one side of the railroad to the other, we need not determine in this case, because under the statute the railroad company was

Points Decided.

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not required to fence its roadbed at the place where this accident occurred.

The judgment is *reversed*. Costs awarded to *appellant*.

Sullivan, C. J., and Ailshie, J., concur.

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(April 16, 1910.)

VICTOR R. RASICOT, Respondent, v. ROYAL NEIGHBORS OF AMERICA, a Corporation, Appellant.

[108 Pac. 1048.]

FRATERNAL BENEFIT INSURANCE—WARRANTIES AND REPRESENTATIONS—  
WAIVER OF BREACH OF WARRANTY—OPINIONS AS REPRESENTATIONS—  
PUBLIC POLICY—"SOUND HEALTH" DEFINED—"PERSONAL AILMENT"  
DEFINED—EVIDENCE—ADMISSION OF PROOFS OF DEATH—  
STATEMENTS TO THE JURY.

(Syllabus by the court.)

1. Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties and not as mere representations.

2. The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment.

3. Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented and at the time honestly believed that she was not pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case and that it would not consider such an application until at least two months after confinement, and the society collected and received dues, assessments and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health, the insurance society will be held to have waived the right to insist on a breach of the contract for the falsity of the answer.



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Points Decided.

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4. Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society.

5. It is contrary to sound public policy and detrimental to the best interests of society at large to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years, and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then after his death to allow the society to repudiate the contract, on the ground that the policy never went into effect because of some temporary cause or disability which existed at the time of the delivery of the policy, and of which the applicant had no knowledge and which was wholly obviated and did not in any manner contribute to the cause of death, increase the risk or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation.

6. An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy.

7. A statement made by a married woman who applies for insurance in a fraternal benefit society that she has not consulted with a physician "in regard to a personal ailment" within the last seven years does not cover a single attendance by a physician upon the applicant some three years prior thereto when she was confined and gave birth to a child. Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in the contract.

8. In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society.

9. Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been

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Argument for Appellant.

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omitted and abandoned in the answer on which the case is to be tried.

APPEAL from the District Court of the First Judicial District (now the Eighth Judicial District), for the County of Bonner. Hon. W. W. Woods, Judge.

Action by plaintiff to recover on an insurance of benefit certificate. Judgment for plaintiff and defendant appealed. *Affirmed*,

Edwin McBee, for Appellant.

The answers in the application for the benefit certificate herein sued on are warranties. (*Beard v. Royal Neighbors*, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 789; *Hoover v. Royal Neighbors*, 65 Kan. 616, 70 Pac. 595; *Sinon v. Royal Neighbors*, 135 Ill. App. 599.)

As a warranty is in the nature of a condition precedent to the validity of a policy, and must be literally true, if the fact warranted is not true, there is a breach of warranty. It follows that a breach of warranty will avoid the policy. (3 Cooley's Briefs on the Laws of Insurance, 1950, and cases cited.)

In view of the general principle that the materiality of the fact is wholly unessential in the case of a warranty, it is readily deduced that where there is a breach of warranty the policy is avoided, though the statements on which the breach is predicated is in no way material to the risk. (3 Cooley's Briefs on the Law of Insurance, 1951; 3 Joyce on Insurance, sec. 1962; *Beard v. Royal Neighbors*, *supra*, *Hoover v. Royal Neighbors*, *supra*; *McDermott v. Modern Woodmen*, 97 Mo. App. 636, 71 S. W. 833; *Price v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *Peterson v. Des Moines Life Assn.*, 115 Ia. 668, 87 N. W. 397; *National Union v. Arnhorst*, 74 Ill. App. 482; *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. 849; *Schane v. Met. Life Ins. Co.*, 76 App. Div. 271, 78 N. Y. Supp. 582; *Aloe v. Mutual Reserve Fund Life Assn.*, 147 Mo. 561, 49 S. W. 553; *Supreme Lodge v. McLaughlin*, 108 Ill. App. 85.)

## Argument for Appellant.

A breach of warranty is fatal to the policy, though the insured had no knowledge of the falsity constituting the breach, and did not intend to deceive the insurer. (3 Cooley's Briefs on the Law of Insurance, 1954; May on Insurance, sec. 156; 3 Joyce on Insurance, sec. 1964; 1 Bacon on Benefit Societies, sec. 197; *Standard Life & Accident Ins. Co. v. Sale*, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 59 Am. Rep. 816, 2 So. 125; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242; *O'Connell v. Supreme Conclave*, 102 Ga. 143, 66 Am. St. 159, 28 S. E. 282; *Conn. Life Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465; *McGowan v. Supreme Court I. O. F.*, 104 Wis. 173, 80 N. W. 603; *Leonard v. State Mut. Life Assur. Co.*, 24 R. I. 7, 96 Am. St. 698, 51 Atl. 1049; *Peterson v. Des Moines Life Assn.*, 115 Ia. 668, 87 N. W. 397.)

The statement by an applicant that she had not consulted a physician regarding any personal ailment within seven years preceding her application, and which was warranted to be true, and which said answer was untrue, constituted a breach of warranty relieving the defendant from liability, without regard to the character of the ailment for which the physician was consulted. (*Beard v. Royal Neighbors*, *supra*; *Hoover v. Royal Neighbors*, *supra*; *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587, 9 Atl. 776; *Cobb v. Assn.*, 153 Mass. 176, 25 Am. St. 619, 26 N. E. 230, 10 L. R. A. 666; *McDermott v. Modern Woodmen*, *supra*, and cases therein cited; *Caruthers v. Kansas Mut. L. Ins. Co.*, 108 Fed. 487.)

Even if the answers in the application were, under a proper construction of the contract, misrepresentations, then they avoid the benefit certificate, if material to the risk. (*Aetna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Alabama Gold Life Ins. Co. v. Johnston*, *supra*; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.)

Reading and commenting, over defendant's objection, on defendant's original answer, which had been withdrawn, was improper and prejudicial, and is, therefore, ground for

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Argument for Respondent.

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reversal. (*Giffen et ux. v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545; *Burke v. McDonald*, 3 Ida. 296, 29 Pac. 98; *State v. Harness*, 10 Ida. 18, 76 Pac. 788; *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188; *Riley v. Town of Iowa Falls*, 83 Ia. 761, 50 N. W. 33; *Taft v. Fiske*, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621.)

The court erred in overruling defendant's objection to the question asked plaintiff as to whether defendant had tendered him the amount of dues and assessments paid by his wife. (*Thompson v. Travelers' Ins. Co.*, 11 N. D. 274, 91 N. W. 75.)

Proofs of death are admissible in evidence, and are *prima facie* proof of the facts stated therein and against the beneficiary and on behalf of the society, the same being admissions by the said beneficiary. (*Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. ed. 1160; *Grand Lodge v. Wieting*, 168 Ill. 408, 61 Am. St. 123, 48 N. E. 59; *Walther v. Mutual Ins. Co.*, 65 Cal. 417, 4 Pac. 413; *Modern Woodmen of America v. Van Wald*, 6 Kan. App. 231, 49 Pac. 782; Elliott on Evidence, sec. 2387; Bliss on Insurance, 2d ed., sec. 265.)

B. S. Bennett, for Respondent.

A pleading, or an admission or allegation in a pleading, notwithstanding it has been withdrawn or stricken from the record by amendment, is competent in evidence against the party from whom it proceeded, like any other admission or declaration. (Abb. Trial Brief, Civil Jury Trials, 2d ed., p. 296, and cases cited.)

We believe that in every case cited by appellant where a forfeiture was upheld, the death of the insured was directly connected with, and grew out of some conditions of health covered by the questions, in regard to which the representations and statements of the applicant were made.

When an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy. (*Merriman v. Grand Lodge*, 77 Neb. 544, 124

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Argument for Respondent.

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Am. St. 867, 110 N. W. 302, 8 L. R. A., N. S., 983, 15 Ann. Cas. 124.)

Statements in such an application for insurance are merely representations, and not warranties. (*Royal Neighbors v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Ranta v. Supreme Tent Maccabees*, 97 Minn. 454, 107 N. W. 156; *Rupert v. Supreme Court U. O. F.*, 94 Minn. 293, 102 N. W. 715.)

What constitutes consulting a physician must be construed liberally, and does not include temporary or slight ailments. The insured is entitled to a liberal construction of the language of the application. (25 Cyc. 817-720; *Brown v. Met. Life Ins. Co.*, 65 Mich. 306, 8 Am. St. 894, 32 N. W. 610; *Hann v. National Union*, 97 Mich. 513, 37 Am. St. 365, 56 N. W. 834; *Brown v. Ins. Co.*, 65 Mich. 306, 8 Am. St. 894, 32 N. W. 610; *Pudritzky v. Knights of Honor*, 76 Mich. 428, 43 N. W. 373; *Plumb v. Penn. Mut. Ins. Co.*, 108 Mich. 94, 65 N. W. 611.)

Where there is a reasonable doubt as to whether statements in an application are warranties or representations, the doubt will always be resolved in favor of the insured. (*Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.)

If there were no fraudulent representations, and the appellant does not claim there were, and the contract never went into effect, justice and equity would require the defendant to return the premium. Proofs of death were filed, an action was brought, the defendant made no offer to return the money which had been contributed to its fund by the insured. It should then have manifested its election to treat the contract as void. (May on Insurance, 3d ed., sec. 4; *Allen v. Phoenix Assur. Co.*, 14 Ida. 745, 95 Pac. 829; *Clement on Fire Ins.* 428; *Modern Woodmen v. Vincent*, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89, and cases cited.)

The appellant compelled the insured to perform her part of the contract in the payment of dues, and it should not be permitted to escape the obligations of the contract on its part, by seeking in after years to avoid the policy, on grounds that have never increased its risk. (*Schreiber v. German-American Hall Ins. Co.*, 43 Minn. 367, 45 N. W. 709; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 427; *Harris v. Society*, 64 N.

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Statement of Facts.

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Y. 196; *First Nat. Bank v. Manchester Fire Assur. Co.*, 64 Minn. 96, 66 N. W. 136; *Mee v. Bankers' Life Assn.*, 69 Minn. 210, 72 N. W. 74; *Gray v. Nat. Benevolent Assn.*, 11 Ind. 531, 11 N. E. 477; Kerr on Insurance, p. 308; *Taylor v. Grand Lodge*, 96 Minn. 441, 105 N. W. 408, 3 L. R. A., N. S., 114.)

"The relation between a subordinate lodge of a benefit society and the principal lodge is that of agency." (*Modern Woodmen v. Breckenridge*, 75 Kan. 373, 89 Pac. 661, 12 Ann. Cas. 636; *High Court etc. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506.)

STATEMENT OF FACTS.

The plaintiff commenced this action in the district court to recover upon a benefit certificate for \$1,000 issued by the defendant, the Royal Neighbors of America, to plaintiff's wife, Emeline Rasicot. About May 14, 1902, Emeline Rasicot was elected as a beneficiary member of Dewey Camp No. 1037 of the Royal Neighbors of America located at Little Falls, Minn. Under date of April 25th she answered the prescribed list of questions, and made application for a benefit certificate in the society. This application appears to have been witnessed and filed by the Camp recorder on June 4th, and on the same date she was given the medical examination and answered the list of questions submitted by the Camp physician. On June 28th the society issued its benefit certificate for the sum of \$1,000, payable to Victor R. Rasicot, husband of the insured. The insured afterward removed to Idaho and transferred her membership to Lakeside Camp No. 2373, located at Sandpoint, Idaho, and thereafter kept up the regular payment of all dues and assessments until the date of her death, February 7, 1907. The beneficiary, Victor R. Rasicot, made the necessary proofs of death and demanded payment on the certificate. The society refused payment, and this action was accordingly instituted. The defendant filed an answer, denying generally the allegations of the complaint and setting up four separate affirmative defenses. The first defense pleaded the by-laws of the society, and the application made by Emeline Rasicot for insurance, and alleged that certain of her answers were false and untrue, and that by

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Statement of Facts.

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the provisions of the application and benefit certificate she had warranted the literal truth of every answer given, and that the policy was therefore void, and never became effective by reason and on account of the falsity and untruth of her answers. The second affirmative defense alleged that under the stipulations and agreements of the application and certificate it is essential to the validity of the policy or certificate that it should be delivered to the applicant while she was in sound health, and that in truth and in fact she was not in sound health at the time of the delivery of the certificate, and that therefore the policy never took effect. The third and fourth defenses are each to substantially the same effect, and allege that the insured died from a criminal and self-inflicted abortion and miscarriage, and that under the terms of her certificate no recovery could be had in such a case. The defendant subsequently filed an amended answer, containing more specific denials of the allegations of the complaint, and later it filed a second amended answer on which the case was finally tried.

The defendant omitted from this last answer the third and fourth defenses relating to the charge that the insured had died from a self-inflicted operation. This answer contained a further allegation as to the falsity of a further question propounded by the company and answered by the applicant. The answer as it finally stood alleged that the applicant had given false and untrue answers to questions 17, 18, 25 (in two particulars), 28, 33-j, 33-v, and 33-l, the questions and answers being as follows:

"17. Are you now of sound body and mind, in good health, free from disease or injury, of good moral character, exemplary habits and a believer in a Supreme Being?" "Yes."

"18. Have you within the last seven years, consulted any physician or physicians in regard to personal ailment? If so, give dates, ailment and physician or physicians' names and addresses." "No."

"25. Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms? Fistula." "No."

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Statement of Facts.

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"25. Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms? Rheumatism?" "No."

"28. Have you ever had any disease of the urinary or genital organs?" "No."

"33-j. Is your menstruation regular and healthy?" "Yes."

"33-v. Have you now or ever had any disease of the breast, ovaries or uterus?" "No."

"33-l. Are you now pregnant?" "No."

The application contains the following provision in several different forms and in different paragraphs and subdivisions thereof:

"I have verified each of the foregoing answers and statements, from 1 to 33, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the face of the foregoing answers, and I hereby constitute and make the officers of the local Camp and of the Royal Neighbors of America, who have aided in making this application, my agents for such purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Royal Neighbors of America, and are offered by me as a consideration for the contract applied for, and hereby made a part of any benefit certificate that may be issued on this application, or a substitute therefor issued at my request, and shall be deemed and taken as a part of any such certificate. That this application may be referred to in any said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I should fail to comply with and conform to any and all of the laws of said Royal Neighbors, whether now in force or hereafter adopted, that my benefit certificate shall be void."

When it came to the trial the chief controversy revolved about the answer to question 33-l. On this question special



findings were submitted to the jury, and the questions submitted and the answers thereto are as follows:

"1. State whether or not the deceased, Emeline Rasicot, was pregnant at the time she made application for a policy of insurance with the defendant, to wit, on June 4, 1902.

"Answer: We, the jury, answer Yes.

"2. State whether or not the said decedent, Emeline Rasicot, if you answer that she was pregnant on June 4, 1902, or June 28, 1902, knew of her condition as to pregnancy on either of said dates, and if so, on what date.

"Answer: We, the jury, answer that she did not know her condition on the 4th day of June, 1902, and did not know such condition June 28, 1902."

The jury at the same time returned a general verdict in favor of the plaintiff for the sum demanded by his complaint.

AILSHIE, J. (After Stating the Facts.)—At the outset it must be conceded that under the terms of this contract the answers given by the applicant for insurance are viewed by the law in the nature of warranties rather than as mere representations. (3 Joyce on Insurance, sec. 1944; Bacon on Benefit Societies, sec. 194; *Hoover v. Royal Neighbors of America*, 65 Kan. 616, 70 Pac. 595; *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 798; *Supreme Lodge Knights and Ladies of Honor v. Payne*, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A., N. S., 127.) It has been found as a fact that the insured was pregnant at the time she made application for insurance and at the time the benefit certificate was issued to her. It is also established that she did not know of her pregnancy at the time and that her answer was in good faith and honestly made. Viewing these facts alone, if we should follow the inflexible technical rule of warranties which has been adopted by many courts, the inquiry would end here and we would hold that the breach itself avoided the contract and that the subsequent conduct of the society could not be considered. (Joyce on Insurance, sec. 1970; *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636, 71 S. W. 833; *Hoover v. Royal Neighbors of Amer-*

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*ica, supra; Beard v. Royal Neighbors of America, supra; and authorities above cited.)*

We are of the opinion, however, that there are rules of law and principles of equity that must be applied to the insurer as well as to the insured, and that its treatment of the contract for a number of years after the effects and consequences of the breach had disappeared is a subject requiring our consideration. The benefit certificate was issued to the insured on the 28th day of June, and thereafter and on the 25th day of November of the same year she gave birth to twins, both of whom were healthy and normal. No unusual or unfavorable condition of health resulted from her confinement. She continued to be a member of Lakeside Camp No. 2373 located at Sandpoint, and continued the regular payment of dues and assessments from time to time and was in fairly good health until shortly before the date of her death in February, 1907. In the meanwhile, she bore at least one child after the birth of the twins. It should at this point be observed that there is no provision of the contract or policy of insurance which attempts to suspend or avoid the contract after it is once entered into on account of subsequent pregnancy. The provision of the contract confronting us is a stipulation against pregnancy existing at the time of the application for the insurance. It is conceded in this case that the death of the insured did not result from any condition of the insured which existed at the time of making the application or of the issuance of the policy; nor, indeed, is it contended that the pregnancy of the insured at the time of the issuance of the policy in any way contributed to the ultimate cause of death or in any way augmented the subsequent risk or diminished her life expectancy. In the application question 33-1 is followed by a star, and at the foot of the application blank is the following note: "If applicant is pregnant, application will not be accepted by Supreme physician. Examination should be postponed until at least two months after confinement." It appears that under the by-laws, rules and regulations of the society in a case of this kind, the application is withheld

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until a period of two months after the confinement of the applicant, and thereupon the physician makes the examination and takes the applicant's answers to the questions, and if they prove satisfactory in other respects, the application is accepted and the certificate is issued.

In this case no fraud was practiced whatever. Although the society contends that the policy never went into effect and that the contract never became binding, still it received and accepted dues and assessments from the insured for a period of more than four years continuously succeeding her confinement and also covering a subsequent period of gestation and confinement, and the society is presumed to have had notice through the local Camp of the existence of the facts and the happening of the contingency which would have avoided the contract. The local camp of which the insured was a member collected and received the dues and assessments from its members, and was charged with the duty of looking after the health and conduct of its members and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the society. The local lodge was, therefore, the agent of the society which issued the benefit certificate, and the appellant after the lapse of more than four years is chargeable with notice of the existence of the condition on the part of the insured which would have avoided the risk and prevented the contract becoming effective and operative. (*Modern Woodmen v. Breckenridge*, 75 Kan. 372, 89 Pac. 661, 12 Ann. Cas. 636; *Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506, 7 L. R. A. 262, 12 Ann. Cas. 638; *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252, 58 Pac. 595; *Modern Woodmen of America v. Lane*, 63 Neb. 89, 86 N. W. 943; *Modern Woodmen of America v. Coleman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Supreme Lodge v. Wellenvoss*, 119 Fed. 671, 55 C. C. A. 287; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.) Under these facts and circumstances the doctrine of waiver should be applied to the society.

In *Supreme Lodge K. of H. v. Davis*, *supra*, the court said: "In a mutual benevolent order, composed of a supreme lodge

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and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting and forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection."

In *Trotter v. Grand Lodge Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A., N. S., 561, 11 Ann. Cas. 533, the court said: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends, not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake."

In *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 113 N. W. 231, Pringle held a benefit certificate which contained a clause to the effect that it should become null and void if the insured should at any time be convicted of a felony. While holding the certificate, the insured was convicted of felony and sentenced to the state penitentiary, where he was confined for about six months and died. The beneficiary sued on the contract to recover the amount of the policy. It appeared that the insured had continuously kept up the payment of his dues and assessments. The supreme court of Nebraska, in speaking through Mr. Justice Barnes, said: "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle's conviction to the head

camp. Indeed, the clerk testified that the governing body knew of the fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to waiver of a similar forfeiture clause."

The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then when the beneficiary comes to make demand for that paltry recompense to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair dealing, and would be likewise contrary to the best interests of the public at large which we term public policy. Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well, and the state itself must feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy, and such a construction as the individuals interested, and society at large must in the end of necessity suffer from the cold-blooded, technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications and accepting dues and assessments for years, and then, after the applicant is perhaps too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens and ought to be discouraged.

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The more than two hundred questions contained in one application blank run the gamut of the applicant's ancestry from his grand ancestors down to date, and ask him about every disease and pathological condition for which the medical world has been able to invent a name, and then if forsooth he misses a guess on any one of them, he is chargeable with expert knowledge and warranting the correctness of his answers and must lose his protection on the venture of a guess. In such a game the insured has only a chance in hundreds, and the result must follow that he only thinks he is insured,—it amounts to mental insurance and nothing more. The insurance society in such case could exist for the sole and only purpose of collecting dues and assessments with no insurance liability.

Some courts have held, and we think the rule sound, that notwithstanding the stipulation of warranty in such contracts, answers which merely express the opinion or judgment of the applicant cannot be classed among the facts, the truth of which is insured by the applicant,—that he only warrants his honesty and good faith as to such answers. (*Rupert v. Supreme Court U. O. F.*, 94 Minn. 293, 102 N. W. 715; *Ranta v. Supreme Tent of Maccabees*, 97 Minn. 454, 107 N. W. 156; *Royal Neighbors of America v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Royal Neighbors of America v. Wallace*, 5 Neb. (Unof.) 519, 99 N. W. 256.) “It would be solemn nonsense,” says the supreme court of Minnesota in *Ranta v. Supreme Tent of Maccabees*, “to hold that an ordinary applicant insures the exact reality of physical conditions and causes at a time when the greatest pathologists might differ or even when they might be impossible of definite determination.” This rule seems to us more in consonance with reason and justice than the rule of strict literal warranty contended for by appellant.

The application contained the stipulation that any certificate which might be issued to the applicant “shall be delivered to me while in sound health and in pursuance of the by-laws of the order.” It is also contended that the insured was not in “sound health” at the time of delivery because

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of pregnancy. Pregnancy is not *per se* a condition of "unsound" health, nor is it a "disease" or "ailment" within the meaning of those terms used in this application and policy. The term "sound health" has been frequently defined by the courts, and so far as we are advised it has never been held that this term used in an insurance policy or certificate covered every slight ailment or indisposition of health of a temporary character which does not tend directly to shorten the life or undermine the constitution of the insured. (*Packard v. Metropolitan Life Ins. Co.*, 27 N. H. 1, 54 Atl. 287; *Morrison v. Wis. Odd Fellows' Mutual Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. 894, 32 N. W. 610; *Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986, 27 C. C. A. 344; 7 Words and Phrases, 6554.) So far as we are informed, this term of itself and standing alone has never been held to cover or include a case of pregnancy. Appellant must, therefore, rest its case on the falsity of the representation that the insured was not pregnant.

Appellant attempted to show that the answer to question 18 was false for the reason that the insured had consulted a physician within the period of seven years immediately preceding her application. On this point there was a sharp conflict in the evidence except with reference to one visit by a physician, who it is admitted attended her on April 5, 1899, the date of her last previous confinement. The appellant had notice that the applicant was a married woman, and that she had already borne five children and that she had been confined on April 5, 1899, which was only about three years prior to this application. It might have assumed that either a physician or a midwife attended her on this confinement. The attendance, however, of a physician at the time of a normal case of confinement is clearly not a "consultation" or treatment of a "personal ailment" of the female confined. Child-birth is a physiological fact which occurs in the regular course of nature, and neither signifies nor entails disease or ailment in the usual and ordinary use of those terms.

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On the trial of the case the plaintiff introduced the physician who attended the insured during her last sickness, and examined him as to the nature of her illness and the cause of death. He testified that she died following an operation performed by him, and testified to the general nature and character of her condition and the cause for which the operation was performed. He said: "The object of it was to remove the right tube and the right ovary and drain for an abscess in the pelvis." He also testified to signing the death proofs, and identified the paper containing the proofs made by him. The defendant thereafter offered to introduce in evidence the death proofs made by this physician. The plaintiff objected and the objection was sustained by the court. This ruling is assigned as error. The court should have admitted this exhibit in evidence. It is a uniform rule almost without exception that such proofs are admissible when offered by the insurer. (3 Elliott on Evidence, secs. 2386-2389; *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A., N. S., 798.) The defendant was not prejudiced by the exclusion of this exhibit. The exhibit has been preserved in the record and is before us. Answer No. 11 is the particular portion of the exhibit that defendant offered in evidence, and to the rejection of which counsel took their exception. It is an answer to the question: "State the remote cause of death." The answer given by the physician is as follows: "Exposure and cold. Patient had a recto vaginal fistula which may predisposed to the pelvic inflammation 1st symptoms, severe abdominal pains, tenderness of whole abdomen, vomiting and constipation, Tympanitis then located pelvic cellulitis uterus became filled was forming in right side filling up Douglas pouch." This answer was substantially the same as that given by the doctor when on the witness-stand. His explanation at length as given on the witness-stand was clearer and more complete than the answer given in the death proofs. This is evidently due, however, to the fact that he was asked more questions. The purpose of this proof should not be lost sight of. The defendant was not seeking to prove that



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the answers given in the death proof showed that the insured had died from a disease or malady or cause not covered by the policy of insurance. The purpose must have been either to impeach or discredit the physician who was then testifying, or, what is more probable, to show by inference that the insured had fistula at the time she made application for insurance. Death took place, however, nearly five years after the application was made, and while she was afflicted with fistula at the time of her death, the inference that she had this trouble at the time she made application for insurance would be very remote and at most only *prima facie*. These facts were substantially all before the jury, and we are satisfied that the appellant was not prejudiced by the erroneous ruling of the court.

Appellant assigns as error the action of the court in permitting the plaintiff to introduce evidence showing that defendant had never paid back or tendered the dues and assessments that had been paid on this benefit certificate. We do not think the admission of this evidence was prejudicial or reversible error. Of course, it was immaterial in view of the fact that the defendant had not tendered it into court or pleaded a return or tender of the premiums paid.

When the case was called for trial and prior to the introduction of any evidence, the attorney for the plaintiff read the pleadings to the jury and thereupon proceeded to make a statement to the jury, and in doing so commented upon the allegations contained in the first answer of defendant, whereupon counsel for defendant made objection to any comment being made on the original answer. This objection was overruled. Further along in counsel's statement, he again made reference to that part of the defendant's original answer in which it had alleged that the insured came to her death by a self-inflicted criminal operation. Counsel for defendant again objected and the objection was overruled by the court. This action of counsel for the plaintiff and the ruling of the court is assigned as error. Without going into any discussion of the evils and dangers of such a practice, it is sufficient to say that we do not approve of the same, and that the court should

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have sustained the objection and admonished counsel to refrain from commenting on any allegations contained in the pleadings that were not then at issue and on which the case was to be tried. (*Owens, Lane & Dyer Co. v. Pierce*, 5 Mo. App. 576; *Stratton v. Nye*; 45 Neb. 619, 63 N. W. 928; *Giffen v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545.) We cannot reverse the judgment in this case, however, on account of this error for the following reason: Counsel for appellant have not preserved in their statement and bill of exceptions any statement that was made by the counsel for the plaintiff, which it claims was prejudicial, and nowhere in the record does it appear what language counsel used. The comment made by counsel may have in no respect been prejudicial, and in the absence of any positive showing in the record as to what it was, we must assume that nothing prejudicial to the appellant's rights was said in this connection.

Many other errors are assigned on the admission and rejection of evidence and the giving and refusing to give instructions to the jury. It is unnecessary to give all these assignments of error specific and detailed consideration here, for the reason that what we have already said covers and disposes of the entire case. We find no error that will either require or justify a reversal of the judgment in this case. The judgment is eminently just, and the defense was highly technical and wholly unconscionable.

The judgment is *affirmed*, with costs in favor of the *respondent*.

Sullivan, C. J., and Stewart, J., concur.

Petition for rehearing denied.

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Points Decided.

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(April 21, 1910.)

R. I. BARNETT, Appellant, v. CHRIS HAGAN and  
GEORGE H. CUSHING, Copartners Doing Business as  
HAGAN & CUSHING, Respondents.

[108 Pac. 743.]

**BREACH OF WARRANTY—PAROL EVIDENCE—EXPLANATION OF TECHNICAL  
TERM—COMPARISON OF MANUFACTURED ARTICLES—EVIDENCE—AD-  
MISSIBILITY.**

(Syllabus by the court.)

1. Where a contract is made for the sale of a safe described in the contract as a "No. 8 F. & B. Victor Safe," in an action founded upon such contract for the recovery of the purchase price, where a defense is made upon the ground of breach of warranty, parol evidence may be received showing the statements and representations of the seller to the purchaser at the time and prior to the execution of said contract, as to what a No. 8 F. & B. Victor safe, as designated in said contract, meant and its character and description.

2. Where a safe is purchased, and an implied warranty arises out of the transaction to the effect that such safe is fireproof, and is a new safe, and in good condition, in an action based upon the contract of purchase, where breach of warranty is plead as a defense, it is error to admit evidence tending to show that the safe was not made in the same way or upon the same plan or theory as other standard fireproof safes.

3. In determining whether a safe warranted to be fireproof is in fact fireproof, evidence may be received showing that safes made by the same company, of like kind and material and method of construction, had passed through fires and withstood the effects of heat without any material injury to the contents of such safes; but comparison cannot be made with safes made by other manufacturers of different kind and materials and constructed upon different plans and theories.

4. Where breach of warranty is plead as a defense, evidence should not be admitted which goes outside and beyond the terms of the warranty and which tends to show that the article warranted does not possess certain other characteristics or qualities which were not covered by the warranty.

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

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Argument for Appellant.

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An action to recover the contract price of a safe. Judgment for the defendants. Plaintiff appeals. *Reversed.*

C. J. Orland, for Appellant.

All conversations of negotiation had prior to the execution of a written contract are inadmissible in evidence. (*Jacobs v. Shenon*, 3 Ida. 281, 29 Pac. 44; *First National Bank v. Bews*, 5 Ida. 678, 51 Pac. 777.)

The evidence of what other Victor safes have done in protecting their contents from fire should have been admitted. It was the best evidence which could be provided. (1 Wigmore on Evidence, sec. 442.)

The court erred in permitting the witness Chick for the defendants to compare the safe in controversy with the safe of other manufacturers, and erred in refusing to allow the plaintiff to compare the safe in controversy with other safes of the same company, as to their fire-protecting qualities. (*Davis v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040; *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1143; *Nat. Bank & Loan Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 152, 18 Morr. Min. Rep. 247; *Chicago St. L. & P. R. Co. v. Champion* (Ind.), 32 N. E. 874; *Leonard v. Southern Pac. Co.*, 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221; *Shea v. Glendale E. F. Co.*, 162 Mass. 463, 38 N. E. 1123; *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254; *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938; *Commonwealth v. Leach*, 156 Mass. 99, 30 N. E. 163; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 32 L. ed. 356; 1 Wigmore on Evidence, sec. 451.)

No warranty can be implied, where the manufacturer or dealer sells a specific article even although such manufacturer or dealer knows the purpose for which the article is to be used, yet no implied warranty arises that the article will be sufficient for the purpose. (*Morris v. Bradley Fertilizer Co.*, 64 Fed. 55, 12 C. C. A. 34; *McCray & C. S. Co. v. Woods*, 99 Mich. 269, 41 Am. St. 599, 58 N. W. 320; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; *Wisconsin Red Pressed*

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Argument for Respondents.

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*Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 166; *Wheaton Roller M. Co. v. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. 33, 58 N. W. 233; *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *DeWitt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. ed. 896; *Davis Calyx Drill Co. v. Mal-lory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973.)

George G. Pickett, for Respondents.

"The representations of a seller familiar with machinery or other articles amount to a warranty, whether so intended by him or not, where the buyer is not familiar with machinery and such articles, and relying on the statements as a warranty, is thereby induced to purchase." (*North Western Lumber Co. v. Calender*, 36 Wash. 492, 70 Pac. 30; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414; *Elliott v. Puget Sound etc.*, 22 Wash. 220, 60 Pac. 410; *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 408.)

"Where goods are sold by description for a particular purpose known to the seller, there is an implied warranty that they are as represented and suitable for the intended purpose." (*Lenz v. Blake-McFall Co.*, 44 Or. 569, 76 Pac. 356; *Nixa Canning Co. v. Lehmann-Higginson Grocery Co.*, 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653; *Lane v. Pacific & I. N. Ry. Co.*, 8 Ida. 230, 67 Pac. 656; *Morse v. Union Stockyard Co.*, 21 Or. 289, 28 Pac. 2, 14 L. R. A. 157; *Hunter v. Porter*, 10 Ida. 86, 77 Pac. 434.)

"In an action for breach of contract of a sale of machinery or other articles, evidence that other machinery or articles, made on the same pattern and of like materials, did good work, is inadmissible." (*Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 408; *Fox v. Stockton etc. Harvester Works*, 83 Cal. 333, 23 Pac. 295; *Stockton etc. Works v. Am. Fire Ins. Co.*, 121 Cal. 182, 53 Pac. 573.)

If any error was committed it was in the court not allowing the respondent to state what representations were made by the plaintiff at the time of and just prior to the signing of the contract for the sale of the safe to the defendants as to what the safe was to be and what it would do, also as to what

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its protective qualities were, as well as what they were to get. (*Davis v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040; *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1143.)

STEWART, J.—This is an action to recover the contract price of a Victor safe sold by the Victor Safe & Lock Company to the defendants upon a written contract assigned to this plaintiff. The order for the safe was as follows:

“THE VICTOR SAFE AND LOCK CO.,

Cincinnati, Ohio,

Moscow, Idaho, January 19, 1907.

Ship to Cold Storage Market, Town Moscow, County Latah, State Idaho, our No. 8 F. & B. Victor safe, for which I agree to pay to your order the sum of Three Hundred Dollars (\$300.00) as follows: One Hundred and Twenty (\$120.00) net cash on arrival and \$25.00 each 30 days until fully paid less \$60.00 for 2nd hand safe in exchange in our office, balance due, \$240.00, to be delivered on board cars at Cincinnati.

Paint on safe the following name: Cold Storage Market.

It is agreed no money shall be paid for, or on account of this order except as above stated, and that the title to said property shall not pass until it is paid for in full, but shall remain the property of The Victor Safe & Lock Co. until such payment is made, and in default thereof said Company, its agent or attorney, may take possession and remove said property without legal process and for which purpose may enter in or upon the premises without prejudice.

It is also agreed that nothing but shipment shall constitute an acceptance of this order, and that this paper contains all the agreement and understanding between the parties hereto and that upon default in any of the payments herein stipulated for, all of the remaining payments shall thereupon become immediately due and payable.

HAGAN & CUSHING,

By G. H. CUSHING.

Spokane Safe & Lock Co.,

No. 3 Bernard St.,

Spokane, Wash.

By Barnett.”

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The defendants interposed two defenses: First, that at the time the order for the safe sued upon was given, the Victor Safe & Lock Co. was a foreign corporation doing business within the state, and had failed and refused and neglected to comply with the constitution and laws of this state regulating and governing foreign corporations; second, breach of warranty; that the safe received was not the safe ordered; that the safe received was defective and was not a No. 8 F. & B. Victor safe under the general terms in the guaranty of said number, and the safe to be supplied thereunder; that upon the arrival of said safe and before the defendants were allowed to inspect the same they were compelled to pay \$68.44 freight, express and moving charges; that they notified plaintiff of the condition the safe was in, and that they would not accept the same, and that it was subject to the order of the defendants and that defendants have been damaged in the sum of forty-five dollars in caring for said safe subject to the plaintiff's order.

Upon the issues thus joined a trial was had to a jury and a verdict rendered for the defendants in the sum of sixty-eight dollars. A motion for a new trial was made and overruled. This appeal is from the judgment and the order overruling the motion for a new trial.

The first defense, that the Victor Safe & Lock Co. was a foreign corporation doing business within the state and had failed and refused to comply with the constitution and laws of the state, seems to have been abandoned by the defendants. There is no evidence in the record or any question argued upon this appeal involving the issue presented by this part of the answer. The entire defense made and the questions raised upon this appeal grow out of the defense of breach of warranty.

When the safe arrived two of the wheels or castors were broken and the defendants notified the plaintiff, as the agent of the Victor Safe & Lock Co., of such fact and the company advised the defendants to accept such safe and file a claim for damages against the railroad company for the damages, and that the safe company would assist the defendants in col-

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lecting the same, and that the fireproof qualities of the safe were in no way impaired by such damage. This defendants refused to do. After these wheels had been received they were placed on the safe and it was removed into the defendants' place of business for inspection, when an examination of the same was made, and the defendant Hagan testified as to its condition as follows:

"In taking hold of the door of the safe, it being locked, I shook it and it shook like a barn door, and I went to work and took the combination and opened it, and examined, and found that the door in being made has five offsets or what you would call steps, and that the door fits against similar offsets in the frame, and on the inner offset, the offset No. 1, as I would call it, I could place eight pennies. . . . I could place these on the inner offset and shut the door and turn the combination; on offset No. 2 I can place four pennies on and shut the door; on offset No. 3 at one place I could place five pennies, in one place a little farther back, only three. In offset No. 4 I can place at one place five pennies and shut the door, and in another place on the same offset I can put four pennies, and close the door; offset No. 5, or the outer one, I can put at one place five pennies, and at another six pennies and shut the door.

"I find that the safe is bulged, what I would call warped on top, and on the right-hand side, I should judge the safe is bulged or warped to the extent of perhaps five-eighths of an inch, and on the left-hand side it is warped to the extent of about  $3/16$ . . . . Around the inside, in the main frames, the packing or filling has penetrated, and it has penetrated more especially from the top coming down, and there is some on the left-hand side, not as much as on the right-hand side and at the top, but it is coming down through. It shows that the filling was green. The mold on the casing itself is a kind of a gray; the filling that comes through has an iron color, I should say it was, or rather dark. . . . I find this coming through the walls of the safe, the opening between the last step or offset and the inner door, offset No. 5.



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"The outside door is very loose. I can place on the side of the door that has the lock on fourteen thicknesses of butcher's paper, butcher manila, between the door and the flanges, shut the door, turn the combination and pull it out. I did the same thing on the top. At the bottom of the door I placed ten thicknesses of this butcher paper, shut the door, and the combination and pulled it out. On the back side, the side the hinges are on, I placed three thicknesses, and shut the door and pulled it out. . . . The filling in that door is cracked; I think it has three cracks leading from the combination up."

The defendants wrote the plaintiff about the condition of this safe and the plaintiff advised them as follows:

"We fully understand your idea about the safe door being loose. However, this is perfectly proper, as when attacked by heat at, say 12-1500 Fahrenheit, there is a chemical action takes place in the safe, that is, in the fireproof filling, and it throws off a steam vapor, and if the door fits tight the safe would blow up; the door expands and takes up some of the slack, and yet there must be sufficient opening for the steam to escape. You need have no fear but that your safe is in fact a fireproof safe, and high grade. . . . I again affirm that your Victor safe is all right and fireproof. . . . Burglar-proof is one thing; fireproof is another. Your burglar-proof door fits tight; your fireproof door loosely. In the very nature of the construction, if it fits tight, it would prove of no value."

The evidence of this witness as to the condition of the safe is corroborated by other testimony, and there is no substantial conflict in the evidence as to the condition of the safe. This witness was asked this question: "I will ask you what Mr. Barnett represented to you a No. 8 F. & B. safe was?" Objection was made to this question and overruled and the witness answered, "Just before the signing of the contract Barnett and I discussed the quality of the safe and he told me just what it was and what I would get. A No. 8 F. & B. Victor safe was a fire, water and burglar proof safe."

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Counsel for appellant contends that this evidence was clearly inadmissible and prejudicial to the appellant; that it related to conversations and negotiations had between the respondents and the appellant before the written contract sued upon was entered into, and that all such conversations and negotiations between the parties were merged in the written contract. Referring to the contract, it will be observed that the safe purchased is described in such contract as "One No. 8 F. & B. Victor Safe." This description standing alone gives no information as to the character or description of the safe purchased, and to give a meaning to such description requires some explanation, which may be found in the representations made by the seller as to what was meant by the use of such words, or by reference to some catalogue or printed matter wherein such safe was fully described.

In this case the question objected to called for a statement by the witness of what the seller said such words meant or a description of the kind of safe the defendants were to receive under a No. 8 F. & B. Victor safe. This evidence in no way contradicted, varied or extended the terms of the contract. It merely described and explained what was meant by the language used in the contract as No. 8 F. & B. Victor safe, and the kind and quality of a No. 8 F. & B. safe. This evidence was clearly admissible. (Jones on Evidence, secs. 455, 456.)

One R. H. Chick, a salesman for the Norris Safe & Lock Co., was called as a witness for the defendants, and among other things testified that he had examined the safe in controversy, found it in a poor condition and not up to grade. He was then asked to describe the safe, and did so, showing its condition to be substantially as testified to by the witness Hagan. During the course of the examination of this witness he defined the term "fireproof," and said it was a relative term, and that a safe might be fireproof under certain conditions, and it might not; that he could not tell whether the safe was fireproof or not; that the words "F. & B." was a common term used by all manufacturers to mean a fireproof body containing within it a burglar-proof chest, the burglar-

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Opinion of the Court—Stewart, J.

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proof chest to be built exactly according to specifications that become standard. In other words, the outside of the chest should be two and a half thick and the body shall be an inch and a half thick. That form has been adopted by various companies in different ways. The witness then testified as to methods adopted by different factories to make their safes fireproof and burglar-proof, and testified that "All doors in standard safes are either tongued and grooved or tight fitting."

Objection was made to the questions asked this witness and the evidence given by him in response thereto, which described how other manufacturers make their safes and compared the safe in controversy with safes of other manufacturers, and that the safe involved was not a standard safe because not made in accordance with rules and regulations adopted by standard manufacturers of safes. This objection was based upon the fact that this evidence did not fall within the warranty as claimed by the defendants; and that there was no pretense that a warranty had been given to the effect that the safe sold the respondents was made like other safes, or that the safe was made under any rule adopted by safe manufacturers generally, or any claim made that this particular safe bore any similarity of theory of construction for the protection of its contents with other safes.

We think this objection is well founded. By the contract the defendants agreed to purchase a No. 8 F. & B. Victor safe, and the plaintiff in describing such safe told the defendants that it was a burglar and fire proof safe. This amounted to an implied warranty that the safe purchased was a fire and burglar proof safe as such term is usually applied, and that the safe was suitable for the purpose for which it was purchased. (*Hunter v. Porter*, 10 Ida. 72, 77 Pac. 434; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414; *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 408; 13 Am. & Eng. Ency. of Law, 135; Benjamin on Sales, sec. 661; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. ed. 86.)

The evidence of this witness to which particular objection was made went very much beyond the warranty. The war-

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ranty was that the safe was to be a fire and burglar proof safe and suitable as a safe, and the safe might have been in accord with such warranty, although not manufactured like other standard safes or upon the same theory and method adopted by other manufacturers in order to make safes fire-proof. If the safe in fact was a fire and burglar proof safe as such term is usually considered, and was suitable to be used as a safe, the fact that it was not made upon the same principle as other safes or in the same manner or upon the same theory, or of like material, would be wholly immaterial and not a breach of the warranty. This evidence of this witness could have but one tendency, and that was to lead the jury to believe that there had been a breach of warranty by reason of the fact that the safe in controversy was not constructed upon the same plan as other standard safes or resembled in construction other standard burglar and fire proof safes. This evidence was prejudicial to the plaintiff and clearly outside and beyond the warranty given at the time the safe was sold. (30 Am. & Eng. Ency. of Law, 226.) Any evidence which tended to show that the safe received was not a fire and burglar proof safe under ordinary conditions or was not according to the warranty, because of its plan or method of construction or because of its disabled condition or the manner in which it bulged on the top or bottom or side, or the doors closed or fitted, was proper and admissible. But the fact that the safe was made differently from other fireproof safes or not in accordance with the rules or regulations adopted by other manufacturers, or evidence that fireproof safes of other makes and name were not made upon the same plan and theory as the safe in controversy or of like material, was not admissible, and was clearly outside of the terms of the implied warranty. There were two methods open to the defendant either of which could be pursued in showing the breach of warranty: First, that the safe received was in a disabled condition, and because of such condition was not a fire and burglar proof safe and fit or suitable to be used as a safe; second, that the particular method or theory upon

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which said safe was constructed, and the material which was used in its construction, were such as to render such safe unfit to be used as a safe and not fireproof as such term is generally recognized; and if the preponderance of the evidence was with the defendants upon either one of these propositions, then the duty of the jury was to find a verdict for the defendants. This same course of reasoning also applied to evidence offered by the plaintiff on rebuttal.

In rebuttal the plaintiff offered evidence to show that other safes manufactured by the Victor Safe & Lock Co., upon the same plan and theory of construction as the safe under consideration, had passed through fires and that the contents had been properly and adequately protected. This the trial court refused to admit. This was clearly error. The very best evidence that could possibly be received in support of the warranty claimed was made by the Victor Safe & Lock Co., that safes of similar kind, constructed upon the same plan and theory, and out of like material, had passed through fires and the contents were not materially injured. The fact that the safes to which such evidence was directed were a different size or different number than the particular safe under consideration would not render such evidence inadmissible, provided such safes were constructed upon the same general plan and theory and of the same material. The term "fireproof" as shown by the expert witnesses, familiar with safes, was a relative term, and a safe might be fireproof under some conditions and not under other conditions; and in this case the implied warranty being that the safe was fireproof, it was for the jury to determine whether or not the safe received was fireproof in the ordinary sense of the term and under ordinary and reasonable conditions.

The evidence received on behalf of defendants, over the objection of the plaintiff to which we have referred, and the evidence offered by the plaintiff in rebuttal and refused upon the objection of the defendants went to the very vitals of this case. We are unable from the record to say that the jury would have returned a verdict for the defendants if this evidence had not been received upon the part of the defend-

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Points Decided.

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ants or had been received as offered on the part of the plaintiff. It is true the jury might have found for the defendants because of a breach of the warranty on account of the disabled condition of the safe, but from the evidence in the case we are not assured that this necessarily would have followed.

Several instructions given by the court were also erroneous for the reasons given above. This necessarily leads to a reversal of this case.

The judgment is *reversed*. Costs awarded to the *appellant*.

Sullivan, C. J., and Ailshie, J., concur.

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(April 23, 1910.)

JUDSON SPOFFORD, Appellant, v. JULIA R. SPOFFORD, Respondent.

[108 Pac. 1054.]

APPELLATE PRACTICE—WEIGHT OF EVIDENCE—DIVORCE—CRUELTY—INDUCING CAUSE—AGGRAVATION OF OFFENSE.

(Syllabus by the court.)

1. Where the trial court has heard and determined a case solely on depositions and documentary evidence, and an appeal is taken from the judgment on the ground that it is not supported by the evidence, the appellate court will examine and weigh the evidence the same as if the case were being tried *de novo*.

2. Where a decree of divorce is asked by the husband on the grounds of cruelty by the wife, and such cruelty is alleged to have consisted in the wife's hostile demonstrations and lecturing, nagging and hectoring the husband on account of what she deemed to be undue attentions and intimate relations on the part of the husband toward other women, and the evidence discloses that he had been so indiscreet in his conduct toward others as to arouse suspicion on the part of his wife, the conduct of the wife in her protests and outbursts of feeling will not be viewed with the same severity and rigidity by the law as it would be in a case where no such apparent provocation existed.

3. The party to the marital contract who by his acts and conduct induces suspicion from the other spouse and thereby pro-

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Argument for Respondent.

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vokes remonstrance, protests and hostile demonstrations from the other party to the contract, must expect when the crisis comes to exercise a degree of patience and forbearance which the law would not otherwise expect of him under more favorable circumstances.

4. Evidence in this case examined, weighed and considered, and held not sufficient to justify the granting of a divorce.

'APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action for divorce. Decree denied, and plaintiff appeals. *Affirmed.*

Eugene O'Neill, and H. G. Redwine, for Appellant.

In this case none of the witnesses appeared before the district judge. The case was heard before a referee and appellant invokes the rule laid down in *Roby v. Roby*, 10 Ida. 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938.

Extreme cruelty may be as effectually caused by conduct which produces mental suffering, and robs complainant of his or her peace of mind as by blows inflicted; and to many persons the burden of the mental suffering will be much harder to bear than the burden of any ordinary physical suffering. (*Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 916; *Barnes v. Barnes*, 95 Cal. 171, 50 Pac. 298, 16 L. R. A. 660; *McDonald v. McDonald*, 155 Cal. 665, 102 Pac. 927, 25 L. R. A., N. S., 45; *Kapps v. District Court* (Nev.), 103 Pac. 235; *Avery v. Avery*, 148 Cal. 239, 82 Pac. 967.)

Black & Wernette, for Respondent.

The gravamen of the complaint of appellant is cruelty and inhuman treatment. It is essential to establish this ground for divorce that the wrongs inflicted must be wilful and intentional. The absence of this element will defeat the divorce. (*Ring v. Ring*, 118 Ga. 183, 44 S. E. 861; *Miller v. Miller*, 78 N. C. 108; *Everton v. Everton*, 50 N. C. 210; *Shaw v. Shaw*, 17 Conn. 189, 7 Bish. Mar. & Div., sec. 1575; *Beckley v. Beckley*, 23 Or. 226, 31 Pac. 470; *Ennis v. Ennis*, 92 Iowa, 107, 60 N. W. 228; 14 Cyc. 601, 602.)

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“The cruelty which lays a just and legal foundation for a divorce must be unmerited and unprovoked.” (*Taylor v. Taylor*, 11 Or. 303, 8 Pac. 353.)

The plaintiff himself has been guilty of such action as estops him from claiming any grounds for divorce, because of the result which such actions had upon his wife, and because of her resentment of the treatment which he accorded her. (*Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277; *Wheeler v. Wheeler*, 18 Or. 261, 24 Pac. 900; *Johnson v. Johnson*, 14 Cal. 460; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938; *Ennis v. Ennis*, 92 Iowa, 107, 60 N. W. 228; *Reed v. Reed*, 4 Nev. 836; *Boone v. Boone*, 12 Or. 437, 8 Pac. 450.)

Where it appears that a defendant in a divorce proceeding has means and his wife has not, the court will allow her suit money and counsel fees. (*Day v. Day*, 12 Ida. 556, 86 Pac. 531, 15 Ida. 107, 96 Pac. 431.)

It is proper to grant counsel fees to wife, and order them paid. (*Pike v. Pike*, 123 Ill. App. 553; 9 Current Law, 93, sec. 7.)

**AILSHIE, J.**—This action was instituted by the husband against the wife, praying for a decree of divorce on the grounds of cruel and inhuman treatment. The plaintiff alleged that the defendant for a couple of years pursued a course of abuse, nagging and hectoring the plaintiff, until she drove him to the verge of nervous prostration, and impaired his health both physically and mentally. The defendant answered, denying the allegations of the complaint. The case was referred to a referee to take the proofs and report the same to the court. The trial court heard and determined the case solely on depositions; and under the rule heretofore announced by this court it is incumbent on us to examine and weigh the evidence on appeal the same as if the case had never been passed upon by the trial court. (*Roby v. Roby*, 10 Ida. 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938.)

The trial court denied the plaintiff a decree of divorce, and this appeal is from the judgment and an order denying a



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motion for a new trial, and the appellant has assigned 217 errors. Most of these go to the admission and rejection of evidence, but the whole question resolves itself down to the sufficiency of the evidence to support the findings and judgment of the trial court. We have examined the record in this case, consisting of more than 600 pages, with patience and care for the purpose of determining not only the facts it establishes, but also the correctness of the rulings of the court in the admission and rejection of evidence. Since the proofs were taken in this case before a referee, the evidence which was excluded is incorporated in the record as well as the evidence alleged to have been improperly admitted being in the record. We shall, therefore, judge and determine the rights of the parties upon the whole record as it appears before us—giving weight to that which was proper to be considered and excluding such, if any there be, as was improperly admitted.

We shall not attempt to set forth in this opinion the evidence produced on either side of the case, nor shall we attempt to analyze the proofs offered. To do so would serve no useful purpose whatever, and to incorporate a statement of the proofs in this opinion would be of no interest or consequence to anyone. We shall content ourselves with stating briefly some of the conclusions that must inevitably be drawn from the record in this case.

At the time of their marriage the plaintiff, who is appellant here, was about fifty-six years old, and the defendant about forty-seven. They intermarried at Trenton, N. J., on September 25, 1902, and lived together harmoniously until about August, 1905. In the year 1905 the appellant was engaged in promoting an electric railway project between Lewiston and Grangeville in this state, and during the meanwhile the parties were residing at Lewiston. In August of that year, plaintiff and respondent, in company with respondent's brother and his family, organized a camping party and invited a family named Twombly. The Twomblys were from Illinois. A few days after they went into camp Mrs. Spofford became greatly displeased over the conduct of her husband toward Mrs. Twombly, and remonstrated with her

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husband about the matter. Appellant had in the meanwhile been paying Mrs. Twombly some attentions and courtesies which tended, perhaps, to arouse his wife's suspicion and to annoy one of her nervous and apparently jealous disposition. In a couple of days the respondent left the camp and went to their hotel in Lewiston and did not return. Appellant remained with the camping party for some two weeks, and in the meanwhile was in daily association with Mrs. Twombly and went fishing with her a time or two. In course of a month the Twomblys went east.

Some time after the Twombly went east there came to Lewiston a Mrs. Monteith and her sister, Miss Wills, who became intimate with the Spofford family. Mrs. Spofford soon became jealous of her husband's attentions to these women. The result of the wife's jealousy of the attentions her husband paid to these several women was many protestations, lectures, and, as the husband testifies, hostile demonstrations on the part of the wife, often extending far into the night and disturbing his rest and peace of mind and breaking down his health. This, he says, became so bad and trying he could no longer endure it, and he accordingly left his wife and declined to live with her any longer.

Under the circumstances of this case, the acts proven against the respondent cannot be held to constitute extreme cruelty within the meaning of the statute. (Sec. 2649, Rev. Codes.) By this we do not mean to say that respondent's conduct in this regard is commendable or that a man must forever endure it with patience. The appellant, however, has not been free from blame and censure. He has pursued a course of conduct toward other women which was calculated to arouse suspicions on the part of the wife and to kindle the fires of jealousy. It is fair to say that the record entirely fails to show that appellant has been criminally intimate with any of these women; it rather inclines us to the belief that he has not, but he has been indiscreet and unwise in his conduct, and he certainly owed it to his wife as well as to himself to "avoid the appearance of evil." It is fully as essential to domestic happiness and tranquility that the parties

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to the marriage contract so conduct themselves that each may be above suspicion from the other as it is to in fact be innocent of the suspected act.

The wife in this case is not a woman of rugged health. She was, on the contrary, of a nervous and excitable temperament. Her jealousy was easily excited. The attentions and courtesies paid by her husband to Mrs. Twombly, Mrs. Monteith and Miss Wills, and a couple of other women whose names have appeared occasionally in the record, were liable to arouse her suspicions and anxiety; and this in connection with his apparent neglect of his wife at the same time was calculated to disturb the peace of the home. In the meanwhile, these several women were carrying stories back and forth between the husband and wife, were telling the husband various and sundry stories about the wife and the things she had said about his conduct and what she would do with reference to exposing and humiliating him, and also things he should have done or said. In the midst of this state of affairs it is not to be wondered if the wife should on some occasions so forget herself as to administer a rebuke to her husband and perhaps do and say some things which, standing alone, would appear cruel or wholly unjustifiable. It is true that such a course of procedure never improves the conditions; it rather tends to aggravate them. But that fact does not lessen the strain of human nature in the parties and their natural tendency to relieve their minds by words and acts. The party to the marital contract who by his acts and conduct thus invites a remonstrance, protest or demonstration from the other party to the contract must expect to exercise a degree of patience and forbearance which the law and good morals would not expect of him under more favorable circumstances.

"Whenever one has well-grounded suspicions," says Mr. Justice Allen in *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277, "That the other is bestowing his attentions elsewhere, and that he finds more congenial society with another than with his wife, the seeds of discord are sown, and the rancorous weeds of jealousy and distrust are sure to grow, and overshadow and wither the flowers of domestic felicity.

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Opinion of the Court—Ailshie, J.

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. . . . Shall the wife be censured because the pangs of jealousy, excited by the husband's conduct, force from her violent, though natural, expressions of injured feeling, in his presence? Her conduct is to be viewed and approved, or censured, according to the state of circumstances as they were presented or made known to her. She is presumed to have the feelings of a woman, and to act in accordance with the natural instincts and promptings of her sex." (See, also, *Wheeler v. Wheeler*, 18 Or. 261, 24 Pac. 900; *Johnson v. Johnson*, 14 Cal. 459; *Beckley v. Beckley*, 23 Or. 226, 31 Pac. 470; *Ennis v. Ennis*, 92 Iowa, 107, 60 N. W. 228; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938.)

If we were in the business of advising matrimonial discordants, we would tell this aged and doubtless well-meaning couple that, in our judgment, neither one is free from fault, and that a mite of charity and a little forbearance and a portion of the courtesies and attentions they must have practiced in other days, mutually administered, would in their case adjust what is now only an aggravated case of jealousy induced by suspicious conduct.

After an examination of the whole record, we find no error which requires a reversal of the judgment and we are satisfied that the trial court properly denied a divorce in this case.

The court by special order permitted typewritten transcript and briefs to be filed instead of printed transcript and briefs as required by the rules. We will, therefore, allow the respondent the sum of twenty dollars, which may be taxed as costs for typewriting her brief. The transcript has been prepared by the appellant and the cost of that, if it has not already been paid, is a charge against the appellant. It is also ordered that the respondent recover from appellant the sum of \$250 to pay attorney's fees for services rendered on this appeal. This is in conformity with the practice heretofore pursued in this court. (*Roby v. Roby*, 10 Ida. 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938.)

Judgment affirmed, with costs in favor of respondent.

Sullivan, C. J., and Stewart, J., concur.

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Opinion of the Court, on Petition for Rehearing.

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## ON PETITION FOR REHEARING.

(June 3, 1910.)

PER CURIAM.—A petition for a rehearing has been filed in this case and is supported by a somewhat exhaustive brief and a review of the pleadings and evidence in the case. Counsel for the petitioners seem to think that the court has mistaken the allegations of defendant's answer for evidence in the case. Counsel also devote some time in their petition and brief to a discussion of the rules of pleading, and the fact that under the statute affirmative allegations in the answer are deemed denied.

We have devoted more than a week to an examination of a voluminous record in this case and to an analysis of the evidence introduced, and after doing so we reached the conclusion which has not been altered or modified by the petition and brief for rehearing. We have given more careful consideration to the evidence given by appellant himself than perhaps any other part of the record, and our conclusions rest perhaps more largely on the evidence given by appellant on direct and cross-examination than upon any other evidence in the case. It is doubtful, indeed, if the appellant's own testimony as modified by him on cross-examination would be sufficient to entitle him to the decree prayed for. It has been said that "hard cases are the quicksands of the law," and we are forcibly reminded of the significance of this epigram by the facts and circumstances of this case.

Counsel assert that the appellant will not live with respondent any more even though he does not procure a divorce. That may be true, but for that condition we are not responsible. If divorces were to be granted to all those who have entered the marital state and afterward make like assertions, the courts would be busy with that class of litigation to the exclusion of other matters. We fully agree with appellant that the respondent's conduct has been harsh and sometimes unjust and not of such a character as was calculated to promote harmony and add to the marital felicity. On the other

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Opinion of the Court, on Petition for Rehearing.

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hand, the appellant himself has not added a large moiety to the peace and happiness of the connubial state, in the matter of his conduct toward respondent since these misunderstandings arose. As it appears to us, the charges and counter-charges here amount to merely an accumulation of those little disagreements, misunderstandings, misapprehensions, indiscretions, and outbursts of feeling and passion which the other party might have better overlooked and could have easily avoided or prevented.

We have not pretended to hold, nor do we wish to be so understood, that cruelty on the part of the wife may not become as much a cause for divorce in favor of the husband as if the cruelty were committed by the husband. Nor do we hold that cruelty may not consist of *acts and conduct* as well as *actual physical violence*. When, however, either party seeks a divorce from the other on the grounds of cruelty which consists merely in words and conduct as distinguished from physical violence, the occasion for the words and conduct and the circumstances under which they were provoked must be taken into consideration and duly weighed before arriving at the conclusion that they constitute such cruelty as will justify a decree of divorce.

We quite readily agree with counsel for appellant that this case presents some deplorable aspects and is calculated to provoke sympathy from one who will carefully examine the facts and circumstances as they are disclosed by this record. When viewed, however, by the unbiased mind of one who is not by force of employment partisan in his view of the parties and circumstances, that sympathy must necessarily go out in a measure toward both of the parties to the case.

We say again that we would not be justified in reversing the judgment in this case and ordering a decree of divorce. The petition is denied.

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Points Decided.

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(April 27, 1910.)

GEORGE T. MILLER, Administrator of the Estate of CARY A. CORYELL, Deceased, Appellant, v. LEWISTON NATIONAL BANK et al., Respondents.

[108 Pac. 901.]

ADMINISTRATOR—CLAIMS AGAINST ESTATE—ALLOWANCE—JURISDICTION OF PROBATE COURT—OBJECTIONS OF HEIRS TO REPORT OF ADMINISTRATOR—HEARING BY PROBATE COURT—FORM OF JUDGMENT IN THE DISTRICT COURT ALLOWING SUCH CLAIMS—LIMITATION OF ACTION—CONTRACT OF GUARANTY—LIABILITY OF DECEASED THEREON—QUALIFICATION OF ADMINISTRATOR TO ALLOW CLAIMS.

(Syllabus by the court.)

1. Where an administrator has tendered his resignation and makes his final report as such administrator, an order made by the probate judge approving such report and discharging him as administrator and appointing his successor approves all that is contained in such final report, but does not approve and allow claims against the estate which are under contest upon objections of the heirs to a former report listing such claims, and the allowance of which claims upon the hearing of the former report was expressly ordered by the probate judge to be continued for further consideration.

2. Where an administrator allows certain claims against the estate and thereafter renders a report listing such claims, and heirs of the deceased object to such report and the allowance of such claims, on the ground that the administrator is interested in such claims as a joint debtor with the decedent, and upon the hearing of such report the probate court approves the same except as to such claims and continues such claims for future consideration, and the administrator tenders his resignation as administrator and renders his final report, and the probate court accepts such resignation and appoints his successor, the approval by the probate court of the final report of such administrator does not approve and allow such contested claims.

3. Where claims are pending against an estate before the probate court, upon an order setting aside their former allowance by the administrator and the probate judge upon objections by the heirs, the probate judge is not required to indorse upon said claims his allowance or rejection of the same within ten days after such order, nor does his failure to do so amount to a rejection of said.

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Points Decided.

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claims and defeat his jurisdiction to set said claims for hearing upon the objections made by the heirs.

4. Where claims are filed against an estate and objections are made by heirs of the decedent to their allowance, and such objections are heard and tried by the probate court and thereafter appealed to and heard and tried in the district court, a judgment rendered in the district court against the administrator of said estate for the aggregate amount due upon said claims, with direction that said judgment be paid by the administrator in due course of administration, is in proper form and not erroneous.

5. The provisions of Rev. Codes, sec. 4071, were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom; and to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period and in such case has no effect.

6. The fact that an administrator allows a claim against the estate, based upon promissory notes upon which the administrator and the deceased guaranteed the payment, does not render void or uncollectible such claim.

7. A contract of guaranty indorsed upon the back of a promissory note in the following words, "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof," is a several as well as a joint obligation of each person who executes such contract.

8. Such contract of guaranty being several, the obligation of each person who executed such guaranty becomes absolute upon default of the maker of such note.

9. Under the provisions of such contract of guaranty, the holder of such note was under no obligation to pursue the maker or use any diligence whatever to enforce the collection of said note against the maker, or to give notice to the guarantors of the nonpayment of said note.

10. The fact that an administrator, jointly liable with the deceased upon a contract of guaranty, allows a claim against such estate founded upon such contract of guaranty, does not show or tend to show a collusion between the administrator and the claimant to allow or enforce such claim against the estate in fraud of the rights of the heirs of said estate.

11. The holder of a promissory note is under no obligation in equity to pursue the maker of such note rather than a guarantor



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Argument for Appellant.

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of the payment of such note, upon default being made in the payment of such note according to its terms, but may rely wholly upon the contract of guaranty and resort to such in enforcing the payment of such obligation.

APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

From a judgment of the district court allowing certain claims against an estate on appeal from the probate court, this appeal is taken. *Affirmed.*

John O. Bender, for Appellant.

The claims of the Lewiston National Bank were finally and conclusively adjudicated by the probate court in the orders of May 25, 1908, settling the final account and finally accepting the resignation of J. Howard Howe, as administrator of said estate, and finally discharging him as such administrator. (Sec. 5401, Rev. Codes; *American Bonding Co. v. People*, 46 Colo. 394, 104 Pac. 83, and cases cited; *State v. Bilby*, 50 Mo. App. 162; Brandt, Suretyship and Guaranty, sec. 532; *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. 730, 33 L. ed. 163; *Waring v. Lewis*, 53 Ala. 621; *Ingram v. Maynard*, 6 Tex. 130; *Francis v. Northcote*, 6 Tex. 185; *State v. Stephenson*, 12 Mo. 182; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127; *Tobelman v. Hildebrandt*, 72 Cal. 313, 14 Pac. 20; *Reynolds v. Brumagim*, 54 Cal. 254; *Luco v. Commercial Bank*, 70 Cal. 339, 11 Pac. 650; *Haynes v. Meeks*, 20 Cal. 288.)

It is certain that the probate court, either by its order of April 30th or by its order of May 25th, finally accepted the resignation of Howe, discharged him as such administrator and revoked his letters; and it is conclusively presumed that every fact existed which was necessary to support such order unless the same is negatived by the record. (*Lucas v. Todd*, 28 Cal. 185; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 241; 23 Cyc. 1306.)

The allowance of said claims by J. Howard Howe was a nullity, because he was a coguarantor with the deceased for

## Argument for Respondents.

their payment and was a large stockholder in the lumber company, the principal obligor of said claims, and therefore his interest was adverse to the interest of the estate, and such allowance by the settlement of his accounts wherein they would be passed upon would be equivalent to the payment of his obligation. (*Henderson v. Ayres*, 23 Tex. 96; *Clark v. Crosswhite*, 28 Mo. App. 34; *State v. Bidlingmaier*, 26 Mo. 483; *Estate of Crosby*, 55 Cal. 578; *Estate of Hill*, 167 Cal. 238, 7 Pac. 664; *Hobson's Estate*, 40 Colo. 332, 91 Pac. 931.)

It is absolutely necessary for a creditor to have his claim allowed by an administrator, who is qualified to allow it within the time provided by statute, and such an allowance is jurisdictional, without which neither the probate court nor the district court on appeal has any authority or power to allow nor to bind the estate to pay. (*Hobson's Estate, supra*; *Alvator v. First National Bank*, 45 Colo. 528, 103 Pac. 378.)

The facts show conclusively that the bank and Howe by their acts were attempting to defraud the estate of Coryell under the forms of the law and through legal proceedings; and that for the court to order the payment of these claims will effectuate the fraud. (*Warren v. Union Bank*, 157 N. Y. 259, 68 Am. St. 777, 51 N. E. 1038, 43 L. R. A. 256; *Perry on Trusts*, 5th ed., sec. 427; *White v. Penuel*, 6 Penne. (Del.) 272, 66 Atl. 362; *Olney v. Conanicut Land Co.*, 16 R. I. 597, 27 Am. St. 767, 18 Atl. 181.)

The contract of guaranty when taken into consideration with the surrounding facts is a joint obligation and not a joint and several obligation of said guarantors. (*Briggs v. Latham*, 36 Kan. 205, 13 Pac. 131; *Bank v. St. Johnsbury & L. C. R. Co.*, 40 Fed. 425; 7 Cyc. 656; *Alpaugh v. Wood*, 53 N. J. L. 638, 23 Atl. 263; *Brady v. Reynolds*, 13 Cal. 32; *Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088.)

James E. Babb, and John R. Becker, for Respondents.

When the account comes on for hearing, the claim comes on also for hearing, although the account only was set for hearing *eo nomine*, and when an order is entered approving

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such account, although it contains nothing about the claims that are listed with and as a part of the account, the claims are also allowed and approved, although they are not mentioned otherwise than by an order simply approving the account. (*McDougal's Estate*, 146 Cal. 191, 79 Pac. 878.)

The probate court retains entire probate jurisdiction and control over the matter, even in those cases where the case is sent to an action in an independent court; because of the provision in section 5474 to the effect that a judgment of an independent court in such an action has only the same effect as the allowance of the administrator and the probate judge, which may be afterward reviewed by the probate court. (*In re More's Estate*, 121 Cal. 635, 54 Pac. 148; *Hall v. Cayot*, 141 Cal. 13, 74 Pac. 299; *Wells v. Robinson*, 13 Cal. 134; *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140.)

Howe was neither a necessary nor a proper plaintiff or claimant on any of the claims of the appellant that were presented to him as administrator. He could not have received or receipted for any part of any of the claims. At the time they were presented there was no state of facts under which by any possibility the claims could have been presented in the name of Howe against the estate.

In Indiana there is a statute similar to the Idaho statute construed in the case of *Wright v. Wright*, 72 Ind. 149.

The three guaranties on which claims were presented constituted joint and several obligations and not simply joint obligations. (*Hunt v. Adams*, 5 Mass. 359; *Holman v. Gilliam*, 6 Rand. (Va.) 39; *Higgins v. Watson*, 1 Mich. 428; *Dart v. Sherwood*, 7 Wis. (523) 446, 76 Am. Dec. 228; *Mayor v. Ripley*, 5 La. 121, 35 Am. Dec. 175; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Maiden v. Webster*, 30 Ind. 317; *Leith v. Bush*, 61 Pa. 395; *Keller's Admr. v. McHuffman*, 15 W. Va. 64; *Ullery v. Brohm*, 20 Colo. App. 389, 79 Pac. 180; 1 Parsons on Contracts, 5th ed., 11; 2 Page on Contracts, sec. 1134; 1 Daniel on Neg. Instruments, 3d ed., 104; 14 Am. & Eng. Ency. of Law, p. 1160 et seq.)

The guaranties in question were not conditional, such as a guaranty of collection only, but were guaranties of payment

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absolutely, and the holder owes no duty of diligence in collection. (*Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575.)

One who, before maturity, unconditionally guarantees the payment of a promissory note, becomes absolutely liable upon default of the maker. The guarantor is not entitled to notice of the maker's default, and the mere neglect of the holder to pursue a remedy against the maker does not discharge the obligation of the guarantor. (*Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161.)

Even if guarantors were indorsers only, they having expressly waived demand, notice and protest, are not entitled to diligence in collection under the uniform negotiable instruments law. (*Armstrong v. Slick*, 14 Ida. 208, 93 Pac. 775.)

STEWART, J.—On March 2, 1907, Cary A. Coryell died in Nez Perce county, this state, and on April 30, 1907, J. Howard Howe was appointed administrator with the will annexed. On November 6, 1907, there were presented to J. Howard Howe, as such administrator, claims in favor of the Lewiston National Bank as follows:

A note dated April 1, 1904, payable to the order of the said bank for the sum of \$8,616.75 and interest, executed by C. W. Colby, J. Howard Howe and C. A. Coryell, on which note it was alleged there was still due the sum of \$6,016.75 and interest.

A note dated December 29, 1905, payable to the order of said bank for the sum of \$10,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and upon the back of which was written the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. C. W. Colby, J. Howard Howe, C. A. Coryell."

A note dated March 30, 1906, payable to the order of said bank for the sum of \$10,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and indorsed with the following guaranty written on the back thereof: "For value received I hereby guarantee the payment of the within

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note and waive protest, demand and notice of nonpayment thereof. C. W. Colby, C. A. Coryell, J. Howard Howe, Louis Diether."

A note dated June 13, 1906, payable to the order of said bank for the sum of \$5,000 and interest, executed by the Colby-Coryell & Howe Lumber Company, and upon the back of which was indorsed the following written guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. J. Howard Howe, C. A. Coryell, Louis Diether, C. W. Colby."

Thereafter and on November 16, 1907, said administrator indorsed upon each of said claims an allowance thereof, and on the same date they were presented to and indorsed as allowed by the probate judge. On November 21, 1907, said administrator returned an inventory and appraisement. On February 14, 1908, Howe filed an account which after notice was approved February 24, 1908, without objection. In this report is found the following recitation: "All claims that have been presented against said estate are on file in said court except the claim in favor of the M. E. Church for \$100, which has been returned to claimant for correction." On February 29, 1908, Fred D. Coryell filed a petition for the removal of J. Howard Howe as administrator. Citation was issued returnable March 10th. On March 10th the administrator filed an answer to the petition and asked leave to resign as such administrator. On March 14th he filed his final account and resignation. On the same day an order was entered setting said final account and resignation for hearing on March 23, 1908. On March 27th Norah B. McDole, Alice E. Denberger and Ella F. Phillips, children of the deceased Cary A. Coryell, filed exceptions to the account of the administrator, one of which was to the effect that the administrator had not returned a statement of claims against the estate containing names of creditors, nature of each claim, when due or when to become due, and whether allowed or rejected.

On April 4th the administrator filed a verified statement listing claims and containing the information on account of

which the exceptions to the administrator's account were made by McDole et al. Among the claims thus listed were the claims of the Lewiston National Bank heretofore referred to. On April 4th heirs of the deceased filed a motion to vacate and set aside the order made by the probate judge approving as allowed by the administrator the claims presented by the Lewiston National Bank. This motion was based upon the claim that J. Howard Howe, C. W. Colby, Louis Diether and C. A. Coryell, deceased, were jointly liable on said notes as guarantors, and were not jointly and severally liable or severally liable thereon, and for that reason upon the death of said Cary A. Coryell said obligations abated and the estate of the deceased was not liable; and J. Howard Howe, the administrator, C. W. Colby, and Louis Diether were alone liable for the payment of such claims.

On April 4th the probate court made an order to the effect that the account filed March 14th having been heard on the objections filed, said account is settled and approved and allowed, except that the validity and amount of the *claims allowed in favor of the Lewiston National Bank not having been passed upon or allowed or adjudicated by a foregoing order, and the validity thereof and the amount due thereon having been reserved for future consideration, and right having been reserved to the heirs, creditors and succeeding administrator to take such proceeding as they might deem proper against said claims of Lewiston National Bank, at any time prior to final settlement of the estate*; but that the foregoing statement shall not delay the final settlement of the account of the present administrator or the acceptance of his resignation.

On April 10th a citation was issued addressed to Howe, administrator, and James E. Babb and the Lewiston National Bank, directing them to show cause on April 20th why the motion of Phillips, Denberger, McDole and Coryell should not be allowed, and attached to the citation was a copy of the motion which in addition to the grounds stated in the original motion alleged that the claims were the claims of the administrator and had not been presented or allowed as provided

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by law; and because the administrator was liable for the claim of \$6,016.75 which had not been presented or allowed as provided by law. On April 23, 1908, the administrator filed an answer to the order to show cause, and the bank also filed an answer.

On April 30th the court made an order which among other things accepted the resignation of J. Howard Howe as administrator, and directed that upon the payment by him to his successor of the balance on hand as per a previous order, together with such other sums as shall have come into his hands since the filing of his final account, he should be discharged and George T. Miller appointed administrator as his successor; that the order vacating an order approving as allowed certain claims to the Lewiston National Bank and specifically reciting, "that the exhibit of J. Howard Howe, administrator, marked 'Statement of J. Howard Howe, administrator, with the will annexed, in re presentation and disposition of claims,' filed April 4th, 1908, in the probate court of Nez Perce county, Idaho, be and the same is hereby approved and allowed as rendered and presented save and except as to the items numbered respectively, 8, 9, 10 and 11 thereof, relating to claims of the Lewiston National Bank for, respectively, \$10,000, \$5,000, \$10,000, and \$6,016.75, which said items are not allowed and approved as rendered and presented by said administrator in said exhibit, but on which the order of approval has as to each thereof been vacated, set aside and held for naught, by an order this day made and entered herein."

On May 4th Howe filed a report showing the status of his account with such estate accompanied with a receipt of Miller, his successor, for all the property belonging to said estate. This report, however, contained no lists of any claims filed against said estate either allowed or rejected. No mention whatever was made of any claims filed or pending against said estate. The report is brief, recites the cash on hand, the sources from which it was received, the amount paid out, the amount claimed as commission and the amount of his certificate of deposit showing the balance in the hands of the ad-

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ministrator. Then follows a receipt from his successor. An order was made fixing a day for settlement of this account and notice given as required by law, and on May 25th the probate court made an order approving and allowing the resignation of the administrator and the acceptance and approval of his final account. No mention, however, was made in this order with reference to the claims of the Lewiston National Bank or whether the same had been allowed or rejected or were still pending against said estate.

The Lewiston National Bank appealed to the district court from certain orders made by the probate court, and the cause was heard in the district court and a judgment entered therein reversing certain orders of the probate court, and from which judgment the administrator appealed to this court. The case was heard in this court and was reported in *Lewiston National Bank v. Miller*, 16 Ida. 201, 101 Pac. 723. In that opinion this court held: "We, therefore, conclude in this case that the district court did not err in dismissing the appeal from the probate court, and that the claims of the Lewiston National Bank and the final account of J. Howard Howe, administrator, with reference to such claims are still pending in the probate court upon the objections and exceptions of the heirs and parties appearing against the allowance of such claims."

After the opinion was rendered in that case by this court, and on June 12, 1909, the probate court of Nez Perce county ordered that the claims of the Lewiston National Bank against said estate and that part of the account of J. Howard Howe as administrator with reference to said claims be set for hearing on June 28, 1909. Objections were filed by children and heirs of the deceased Cary A. Coryell to the probate court proceeding further under the order that was made June 12, 1909. This motion is quite elaborate but in the main assigned as a reason that it appears from the records that on May 25, 1908, Howe was finally discharged as administrator, and that he had rendered a full, true and correct final account; and because this court in the opinion heretofore referred to held that on April 30, 1908, the date when the orders of the probate court were made from which appeals were



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taken, the claims of said bank were still pending against said estate, and under that decision the claims stood on April 30, 1908, the same as if they had been presented to said probate judge for his approval as provided by sec. 5466, Rev. Codes, and that said claims remained pending against said estate for a period of ten days or more after said April 30th, and said probate judge refused and neglected to indorse on said claims his refusal of allowance or rejection; and that his failure to act amounted to a rejection of said claims by operation of law, and inasmuch as the probate court thereafter, on May 25th, approved the final account of Howe and thereby disposed of said claims of said bank, and no appeal having been taken from said order, the probate court thereby lost jurisdiction of said matter without first vacating and setting aside said order of May 25th.

This matter came on for hearing before the probate court and the probate court made an order to the effect that the order of May 25, 1908, approving said final account of said Howe and discharging him as administrator of said estate, embraced all matters of said administrator in his administration of said estate which had not theretofore been passed upon by said court; that the claims of said Lewiston National Bank were not approved by the probate judge of said court at any time after the making of said orders on April 30, 1908, from which said appeal was taken to the district court, and that said claims upon the expiration of ten days from the date of said orders became rejected, under the provisions of sec. 5466 of the Rev. Codes, and stood rejected in said account of said administrator thereafter, and at the time of the approval of said account by said court on May 25, 1908; that said order of May 25th has not been vacated, but remains in full force and effect, and that the claims of the bank are denied, rejected and disallowed and the proceedings dismissed. From this order of the probate judge an appeal was taken to the district court.

When this case was called for trial in the district court the heirs of Coryell made a motion to dismiss the appeal on the following grounds: First, that this appeal is not taken

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from a judgment or order of the probate court granting, refusing or revoking letters testamentary or of administration or of guardianship, admitting or refusing to admit a will to probate; acceptance or in favor of the validity of a will or revoking the probate thereof, acceptance or in favor of setting apart property or making an allowance for a widow or child, acceptance or in favor of directing the partition, sale or conveyance of real property, settling an account of an executor or administrator or guardian, refusing, allowing or directing the distribution or partition of an estate or any part thereof, or the payment of a debt, claim, legacy or distributive share, confirming the report of appraiser, setting apart the homestead; second, that the probate court had no jurisdiction because the matter had been finally determined in the order of May 25th approving the final account of Howe. This motion was denied, and thereafter counsel for the heirs objected to the court hearing the matter on the ground that the court had no jurisdiction, because the matter had been determined by the decree of the probate court on May 25, 1908. This objection was overruled by the district court, after which counsel for the bank made a motion for judgment in favor of the bank and against George T. Miller, as administrator of the estate of Cary A. Coryell, deceased, upon transcript of the record from the probate court. This motion was also overruled. Whereupon, a transcript certified by the clerk of the probate court on September 28, 1909, and filed in the district court on the same day was offered and received in evidence. The bank also introduced in evidence each of the promissory notes heretofore referred to and upon which the bank based its claim against the administrator of the Coryell estate. No objection whatever was made to the introduction of these notes and no question urged as to the genuineness of the signatures. J. Howard Howe was then sworn as a witness and testified that the several claims referred to were presented to him as administrator of the estate of C. A. Coryell on November 16, 1907, and that the notes had not been paid and stated the amount due. F. W. Kettenbach was also sworn, and testified

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that nothing had been paid upon these notes since their presentation to Howe as administrator.

The court made its findings of fact and conclusions of law and entered judgment in favor of the Lewiston National Bank v. George T. Miller, administrator *de bonis non* of the estate of Cary A. Coryell, deceased, for \$38,865.58.

There was no error in overruling the motion to dismiss respondent's appeal from the probate to the district court. Sec. 2831, Rev. Codes, clearly authorized the appeal from the order made by the probate judge which in effect amounted to a disallowance of the respondent's claims against said estate.

The question upon which this appeal necessarily turns is: Was the objection made to the jurisdiction of the probate court to proceed under the order made on June 12, 1909, setting the claims of the Lewiston National Bank against said estate and the account of Howe as administrator for hearing on June 28, 1909, well taken? This objection was based upon two propositions: First, that this court having decided (16 Ida. 201, 101 Pac. 723) that the claims of the respondent were in the status of pending and undetermined claims on April 30, 1908, the date of the order from which the appeal was taken in that case, under the provisions of Rev. Codes, sec. 5466, the probate judge was required to approve or disallow said claims within ten days after such date, and the probate judge not having indorsed his approval of said claims within the said ten days, such neglect amounted to a rejection of said claims; second, the administrator having made a report on May 25, 1908, and subsequent to the date this court in the former opinion held that said claims were in the status of pending claims, and said report having been approved and no appeal having been taken from the order of approval, the action of the probate court in approving said account became final and conclusive as to such claims.

The status of these claims at the time the order of April 30, 1908, was made and from which the appeal was taken is very fully discussed in the former opinion in this case (16 Ida. 201, 101 Pac. 723, *supra*), and in that opinion this court says: "It appears that the Lewiston National Bank presented claims

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to the administrator on November 6, 1907; that on November 16, 1907, the administrator allowed said claims, and on the same day they were presented to the probate judge and by him allowed. On the 14th of March the administrator filed his account and resignation and the same was set for hearing on the 23d of March. On April 4th, after exceptions had been filed to the failure of the administrator to return a list of claims, and after a motion had been filed to vacate the allowance of the claims by the court, the probate court filed an order to the effect that the claims of the Lewiston National Bank had not been passed upon and allowed and were reserved for future consideration; and on April 30th the resignation of the administrator was allowed, a new administrator was appointed and an order was made vacating and setting aside the order made by the probate judge on the 16th day of November, 1907, approving and allowing the claims of the Lewiston National Bank; and the report of Howe administrator, made on April 4, 1908, of a re-presentation and disposition of claims against the estate was approved, except as to the claims of the Lewiston National Bank which were not allowed and approved as rendered and presented by the administrator."

It thus appears that the claims of the respondent were presented to J. Howard Howe, the original administrator, and by him allowed and that their allowance was approved also by the probate judge. Afterward objection being made to such allowance by the heirs of Cary A. Coryell, on the ground that Howe, as such administrator, was interested in such claims by reason of his contract of guaranty, and therefore not qualified to act as administrator or allow such claims as administrator. Upon this objection being made the probate court set aside the allowance previously made and continued such claims for future consideration, and upon this condition of the record this court held in the former opinion that on April 30, 1908, such claims were in the status of pending claims against such estate. The statute regulating the presentation of claims for allowance does not require that said claims shall be presented to each administrator who may act

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as such during the administration of such estate. One presentation of a claim is sufficient, and if objections are made to its allowance, it becomes a contested claim, but the statute does not require a re-presentation of such claim after it becomes a contested claim.

The claims involved in this case were presented to both the administrator and the probate judge. The fact that the allowance indorsed upon such claims at the time of presentation was afterward set aside by the probate judge upon objection being made by heirs of the deceased, would not necessitate any further presentation of such claims to the administrator or the probate judge. The indorsement of the time of presentation and the allowance or rejection of a claim is a requirement for the purpose of fixing the time from which the statute of limitations begins to run, but is not a requirement which in any way affects the validity of the claim. One of the methods specifically pointed out by statute, by which the heirs of a decedent may contest a claim presented against the estate is by objections to the report of the administrator which shows the allowance of such claim; it was this method the heirs of Cary A. Coryell pursued in this case, and it was upon such procedure that this court held in the former opinion that the claims of the respondent were pending claims on April 30, 1908, the date of the order from which the appeal was taken in that case. Upon the second proposition it would seem that a discussion is wholly unnecessary, because if appellant is correct in his contention that the approval of the report made on May 25th disposed of the claims of the respondent, then the approval of such report approved such claims, and appellant has no standing in this court.

Counsel for appellant, however, contends that it was necessary for respondent to present the claims involved in this case to the administrator and the probate judge for indorsement within ten days after April 30, 1908, and that this not having been done, such claims were rejected by law and after that date stood as rejected claims, and when the report of May 25th was approved the rejection of such claims was also approved. But we do not believe that this contention is cor-

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rect. The report made on May 25th was merely a supplemental report covering the acts of the administrator subsequent to his former report, and in no way alluded to or gave an account of or reported on the claims of the respondent. The heirs had objected to Howe as administrator allowing such claims, and it was upon this objection that Howe tendered his resignation as such administrator, and the orders of the probate court show conclusively that the claims of the respondent were continued and no disposition whatever made of them for the express purpose of leaving such claims pending for consideration by the administrator to be appointed as the successor of Howe. For this reason no mention whatever was made of these claims in the final report of Howe made on May 25th and which was afterward approved. The approval of that account in no way disposed of the respondent's claims; they had been expressly reserved by the orders of the probate court for future consideration, and the report shows conclusively that no hearing was had subsequent to April 30th upon these claims or did the probate court take any action upon such claims subsequent to that date. If, then, the report of the administrator made on May 25th did not embrace these claims, and the approval of such report in no way approved or disposed of such claims, then such claims were in the status of pending claims against said estate and in the same condition in which they were on April 30, 1908, the date the order was entered from which the former appeal was taken.

Counsel for appellant, however, contends that either the order made on April 30th or the order made on May 25th revoked the letters of administration issued to Howe and determined every matter which was necessary to be determined, including the settlement of all the accounts of such administrator including the claims of the respondent, and that such order released such administrator from any further duties to the estate and ousted the probate court of jurisdiction over him and over the affairs and accounts of his administration. Returning to the order of April 30th we find that such order accepted the resignation of J. Howard Howe as administrator and appointed George T. Miller as his successor, and directed

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that Howe turn over to Miller all moneys and property belonging to said estate, and then expressly recited: "That the exhibit of J. Howard Howe, administrator, marked 'Statement of J. Howard Howe, administrator, with the will annexed, in re presentation and disposition of claims,' filed Apr. 4th, 1908, in the probate court of Nez Perce county, Idaho, be and the same is hereby approved and allowed as rendered and presented save and except as to the items . . . relating to claims of the Lewiston National Bank for, respectively, \$10,000, \$5,000, \$10,000, and \$6,016.75, which said items are not allowed and approved as rendered and presented by said administrator in said exhibit, but on which the order of approval has as to each thereof been vacated, set aside and held for naught, by an order this day made and entered herein." This order then accepted the resignation of Howe, appointed his successor, directed him to turn over the property of the estate to his successor, and approved all of his account except the matters relating to the claims of the Lewiston National Bank, respondent herein.

In reviewing this order in connection with previous orders made by the probate court, this court held that such claims were pending claims upon the making of such order. (16 Ida. 201, 101 Pac. 723.) Referring also to the report made by Howe on May 25th, it shows that it embraced matter and acts of the administrator subsequent to his former report, and was a final account showing the receipt of his successor for the property belonging to said estate, and was made in accordance with the provisions of the order of April 30th, and in no way referred to the claims of the bank, thus leaving such claims in the same condition in which they were at the time the order of April 30th was made. The approval of the report filed May 25th ended Mr. Howe's connection as administrator with such estate, and was final as to his accounts except on such matters as had not been disposed of and were continued for future consideration. The probate court in approving the report of Howe as administrator and accepting his resignation and appointing his successor did not thereby approve claims filed against said estate which were expressly

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reserved for future consideration; neither was it necessary for the probate court to finally dispose of pending claims against such estate, before the court had power to accept the resignation of the administrator or appoint his successor.

It is next contended that the district court erred in rendering judgment against the appellant estate in the aggregate sum found due upon the contested claims. Under this contention it is claimed that the only judgment the district court could render was to order the probate court to allow such claims, and that any heir or creditor of said estate, notwithstanding such order or judgment of the district court, would have the right to contest said claims at any time before they were passed upon in settling the final account of the administrator. In the case of *In re McVay's Estate*, 14 Ida. 64, 93 Pac. 31, this court very fully discussed the question of practice on appeal to the district court from the probate court in probate matters and said: "Whatever judgment may be entered in the district court is to be certified back to the probate court for execution in accordance therewith."

When an account rendered by an administrator comes on for hearing, everything contained in such account also comes on for hearing including listed claims, and when an order is entered approving such account such order approves everything contained in such account. If, however, such account is not approved *in toto*, and claims listed in such account are rejected and disallowed upon objection and protest of heirs or creditors of said estate, and such matter is thereafter appealed to the district court and there litigated and tried, and a judgment rendered in favor of the claimants, such judgment establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge; and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment. In other words, such claim by passing



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to judgment becomes an acknowledged debt of the estate to be paid in due course of administration.

Referring to the judgment in this case, it is for the aggregate amount found by the district court to be due the respondent upon such claims, and is rendered against the appellant as administrator for such sum, and directs that such judgment is to be paid in due course of administration of said estate. We see no reason why this judgment is not correct in form or why it would have been necessary to render a separate judgment on each one of the specific claims. They were all alleged to be due the same claimant by the same estate, and while the findings of the court specified the amount due upon each, yet there is no reason why the judgment should be a separate judgment upon each claim. In any event, we are unable to see how the appellant could in any way have been prejudiced by the form of the judgment.

It is also contended that the claims involved in this case are barred under the provisions of sec. 4071 of the Rev. Codes. This section in part is as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

It is apparent that the provisions of this section were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom, and thus to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period, and in such a case it has no effect whatever.

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In the case of *McMillan v. Hayward*, 94 Cal. 357, 29 Pac. 774, the supreme court of that state had under consideration sec. 353 of the Code of Civil Procedure of that state, which is identical with sec. 4071, *supra*, and held:

“The evident purpose of sec. 353 is to secure to a party who has a cause of action against a decedent one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time. If it be necessary in order that such person shall have one year after the appointment of a legal representative, then suit may be brought after the expiration of the general limitation; otherwise this section does not have, nor was it intended it should have, any effect whatever upon his rights. Such construction does not shorten his time, as limited by the general statute. It simply leaves him to that statute, because it was not necessary to extend the time in order to give him his year.”

Referring to the notes upon which the claims involved in this case are based, we find that the first note was dated April 1, 1904, and payable on demand; the second, March 30, 1906, payable on demand; the third, dated June 13, 1906, payable on demand; the fourth, dated December 29, 1905, payable on demand. The limitation for commencing an action founded upon these notes is five years, as provided by Rev. Codes, sec. 4052. The record in this case shows that the deceased died March 2, 1907. Letters testamentary were issued April 30, 1907. Notice to creditors was ordered May 11, 1907, and the first publication was made May 12, 1907, and the claims were presented and allowed by the administrator and judge on November 16, 1907.

The order vacating the allowance of the judge was made April 30, 1908. The claims were listed by the administrator supplementary to his account of March 14, 1908, such supplementary list filed April 4, 1908. Objections were made to the allowance of these claims and they were set for hearing and have been under contest ever since. From this record it appears that on November 16, 1907, at the time such claims were allowed by the administrator and the probate judge,

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the general statute of limitations had not run against any of these notes; neither had such statute run at the time objections were made by the appellants to the allowance of such claims and the claims were set for hearing. We are unable to find any statutory authority for the contention of the appellant that it was the duty of the respondents to have their claims either allowed, or rejected and suit brought thereon within one year from the date of the issuing of the letters of administration. That is not what is meant by the provisions of sec. 4071, *supra*.

It is next contended that the allowance of the claims in controversy by J. Howard Howe, while he was administrator, was a nullity, because he was a coguarantor with the deceased for their payment and was also a stockholder in the lumber company, the principal debtor, and by reason of such facts his interest was adverse to the interests of the estate, and the approval of his account as administrator would be equivalent to the payment of his own obligation. It will be observed that the allowance of respondent's claims by Howe as administrator was set aside by reason of objections made by heirs of the deceased, and that such claims thereafter were heard upon trial both in the probate and the district court, and the respondent was required to prove its claims. The allowance, therefore, of Howe, whether valid or invalid, in no way affected the respondent's right to recover upon said claims against said estate. As said by this court (16 Ida. 201, 101 Pac. 723, *supra*): "The mere fact that such claim has been previously allowed by the probate judge would not affect such claim upon such hearing, except to cast upon the heir the burden of proof, as the former allowance of such claims would become evidence *prima facie* of the claim. The order, however, of the probate judge setting aside the former allowance was not equivalent to a disallowance of such claim but left such claim as still pending against said estate." But in addition to this reason we do not believe that the allowance of such claims by Howe rendered said claims void or uncollectible. Howe was appointed administrator upon petition of the heirs. He had no claim against the estate and made no claim

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by reason of the notes in controversy in this case. He had not paid said notes; therefore, was not a creditor or a claimant against said estate. Before he could have been a claimant against said estate on account of such notes it would have been necessary for him to have paid such notes; and even if it be conceded that he was a creditor or might become a creditor of said estate, still such fact would not have disqualified him from acting as administrator or rendered said claims void or uncollectible. (Rev. Codes, sec. 5351.)

It is next contended that the presentation of such claims to Howe and his allowance of the same *in toto* while he was equally liable as guarantor and also as a stockholder of the principal debtor, the lumber company, and the fact that the bank as claimant and Howe as administrator had the same attorney, in resisting the motion of the heirs to vacate such allowance amounted to a collusion to defraud the estate of its rights to indemnity against the principal debtor, and the right to contribution against Howe as coguarantor.

We think that there can be no question but that the contract of guaranty indorsed upon the claims in controversy in this case and signed by Colby, Coryell and Howe is a joint and several obligation of said guarantors. The contract, "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof," is a several as well as a joint obligation of each person who executed such contract. It is expressly provided by subd. 7 of sec. 3474 of the Rev. Codes, as follows, "Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." In construing such promises the courts have, as a rule, reached the same conclusion as is announced in this statutory provision. (14 Am. & Eng. Ency. of Law, 1160; 1 Daniel on Neg. Instruments, sec. 104; 2 Page on Contracts, sec. 1134; 1 Parson on Contracts, p. 27.) If, then, the contract of guaranty was several, the obligation of Coryell to pay became absolute upon default of the principal, the lumber company. (*Armstrong v. Slick*, 14

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Ida. 208, 93 Pac. 775; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117.)

The signers of this guaranty were under an absolute agreement to see that the maker paid the notes at maturity. The contract of guaranty was absolute and not conditional. If the maker failed to pay the note when due, the contract of guaranty was broken and the holder of such notes had a right of action against each or all of said guarantors. The holder of such note was under no obligation to pursue the maker or use any diligence whatever to enforce the collection of said note against the maker, or to give notice to the guarantors of the nonpayment of said note. (*Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575.) In this latter case the court very exhaustively deals with the nature and extent of a contract of guaranty, and in the course of the opinion says: "A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. (2 Pars. Cont. 520.)" And the court also quotes with approval from the case of *Brown v. Curtiss*, 2 N. Y. 226, as follows:

"The undertaking of the defendant was not conditional, like that of an indorser, nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the nonpayment, nor that he should sue the maker, or use any diligence to get the money from him."

In the case of *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161, the supreme court of Minnesota had under consideration a guaranty in the following language: "For value, I hereby guaranty the payment of the within note to Cassie Hungerford or bearer"; and the court says: "The guaranty of 'the payment of the within note' imported an undertaking, without condition, that, in the event of the note not being paid according to its terms,—that is, at maturity,—the guarantor should be responsible. The nonpayment of the note at ma-

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turity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand." The principle thus announced is in accord with the general weight of authority. (*Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Johnson v. Charles D. Norton Co.*, 159 Fed. 361, 86 C. C. A. 361; *Hoyt v. Quint*, 105 Iowa, 443, 75 N. W. 342.)

When, therefore, claims based upon said notes were presented to Howe as administrator of the estate of Coryell, and Howe allowed the same, he did no more than recognize the legal liability of the estate of Coryell, under the contract of guaranty. There was no reason why such claims should not have been allowed, in so far as the contract of guaranty was concerned, and in making such allowance the administrator merely recognized the liability of the estate under the contract of guaranty.

The statement embraced in the last objection, to the effect that the bank as claimant and Howe as administrator had the same attorney in resisting the motion of the heirs to vacate such allowance, is not borne out by the record. The uncontradicted evidence in this case shows that James E. Babb was the attorney for J. Howard Howe, administrator, and that he had nothing whatever to do with the presentation or allowance of the claims of the respondent; that after Mr. Howe's resignation as administrator and the appointment of Miller, then Mr. Babb became attorney for the bank in prosecuting such claims. There is nothing in the record in this case which even tends to show any collusion or fraud in the allowance or prosecution of the respondent's claims.

The fifth contention of appellant as to the contract being joint and not several, has heretofore received attention. It is next contended that before the bank could recover upon the claims involved in this case it was necessary to prove that the principal debtor, the lumber company, was insolvent and unable to pay said claims, and that it was also necessary to show that the claims could not be collected from either the lumber company or Howe in order to refute the evidence of collusion between the respondent and Howe. This is a most

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remarkable contention, and, as we view the case, is founded upon surmise rather than the facts as disclosed by the record. As heretofore shown, the contract of guaranty entered into by Coryell, as one of the guarantors, became absolute upon the failure of the lumber company, the principal debtor, to pay the note; and when such obligation became absolute, no duty was imposed upon the bank to pursue the principal debtor, but the bank had its option to resort to the contract of guaranty and this it did, and the fact that Howe as administrator recognized this contract of guaranty does not establish the fact that he was acting in collusion with the bank in order to injure the estate of Coryell or take from such estate property for which it was not legally liable.

There is no equitable principle to which our attention has been directed, and none suggested by the facts, which would require the bank to pursue the principal debtor, the lumber company, before it attempted to enforce the contract of guaranty. No doubt when the bank loaned the money, to secure which the notes involved in this case were given and the contracts of guaranty entered into, the bank relied upon such contracts of guaranty to the extent of the financial responsibility of the guarantors as security for such debts; and the bank had a legal right to pursue such contracts in order to recover the amount due upon such obligations, and no duty was imposed upon them to select any one of the debtors rather than any other one, against whom to enforce such obligations. There is no pretense in this case that the appellant was not legally obligated to pay the claims involved in this case upon the contract of guaranty, unless they have been released therefrom by the fact that Howe, a coguarantor acting as administrator of the appellant estate, allowed such claims against said estate, or because a collusion was shown to exist between the bank and Howe, for the purpose of compelling the estate to pay such claims, or because the contract of guaranty was joint, and upon the death of Coryell he thereby became released from said obligation. Whether Howe and Colby, as joint guarantors with Coryell, are liable to the appellant estate for their contributive share is not involved in this case. The

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Points Decided.

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death of Coryell would not release his estate from its liability, under the contract of guaranty, or pay the debt.

Counsel for appellant has exhaustively presented this case both in oral argument and brief. The questions upon which he relies for a reversal are in the main theoretical and technical. We have made an exhaustive examination of this case and find no error in the record which calls for a reversal. The judgment is *affirmed*. Costs awarded to *respondent*.

Sullivan, C. J., and Ailshie, J., concur.

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(April 28, 1910.)

ARCH CUNNINGHAM, Appellant, v. W. H. THOMPSON,  
D. H. MOSELEY and A. P. BURNS, as the Board of  
County Commissioners of Ada County, Respondents.

[108 Pac. 898.]

STATUTES—WHEN VOID—ROADS—SPECIAL TAX—BOARD OF COUNTY  
COMMISSIONERS—POWER TO TRANSFER FROM CURRENT EXPENSE TO  
ROAD FUND.

(Syllabus by the court.)

1. A section of a statute which provides for raising a fund to pay bonds by a special tax and which provides no machinery or method for carrying into effect such section, will be held to be inoperative and void.

2. Sec. 21 of an act approved March 16, 1909 (Laws of 1909, p. 274), commonly known as "The Good Roads Law," imposes no duty upon the board of county commissioners to levy the special tax referred to in such section, and provides no method or manner of levying such tax or the collection of the same, and provides no machinery for carrying said section into execution, and is therefore inoperative and void.

3. It is the law in this state that if the provisions of an act are connected in subject matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other, then if one part falls, the entire act must fall.



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Argument for Appellant.

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4. *Held*, that sec. 21 of the act of March 16, 1909 (Laws of 1909, p. 274), is an essential and necessary part of said act, and that it clearly appears that the legislature would not have passed said act without sec. 21 having been made a part thereof, and that sec. 21 and sec. 20 were designed by the legislature to operate for the same purpose—that is, to provide the method of creating a fund for the construction and maintenance of the roads of the county, and that each section depends upon the other.

5. *Held*, that sec. 21 being inoperative and void, the entire act is void.

6. The emergency contemplated by Rev. Codes, sec. 937, which authorizes the board of county commissioners to transfer funds from the current expense fund to the road fund, was such emergency as might arise out of the actions of the elements in destroying or injuring roads or bridges, and not emergencies arising by the failure of the legislature to authorize the levying of an adequate tax to keep the roads in such condition as the board of commissioners deem they should be kept in, or emergencies arising because of inoperative and void acts of the legislature in creating such road fund.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

An appeal from a judgment of the district court affirming an order of the board of county commissioners transferring money from the current expense fund to the road fund. *Reversed*.

E. J. Frawley, for Appellant.

If an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means of carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative. (*Hillborn v. St. Paul Ry. Co.*, 23 Mont. 229, 58 Pac. 551, and cases cited.)

If it is plain that the legislature would not have passed the valid portions of the law without the invalid portion, the entire act must fall. (*In re Hendricks*, 60 Kan. 796, 57 Pac. 965.)

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M'Cready Sykes, for Ada County Good Roads Assn., *amicus curiae*.

The law is undoubtedly in some respects a bungling and defective piece of legislation. This distinction, however, is not unique in American legislation, and what we have to do is to take the law as we find it, and the fact that it is crude and incomplete throws little or no light on the question of its constitutionality. Unless it violates some provision of the constitution, it is a valid exercise of legislative power, however badly done it may be, and under our system of government the remedy for its defects must be found in the proper and lawful process of amendment at the hands of the law-making body. (*Wright v. Kelley*, 4 Ida. 629, 43 Pac. 565.)

Chas. P. McCarthy and Cavanah & Blake, for Respondents, cite no authorities.

STEWART, J.—The appellant, a resident taxpayer of Ada county, appealed to the district court from the following order made by the board of county commissioners:

“WHEREAS, It appears to this board of county commissioners that the maximum amount of eighty cents on one thousand dollars on the assessable property in Ada County, which can be levied for road purposes for the fiscal year beginning on the second Monday in January, 1910, will yield approximately the sum of \$8,000.00; and,

“WHEREAS, It appears that during the fiscal year beginning on the second Monday in January, 1910, it will be necessary for this board of county commissioners in keeping the public highways within said Ada County in repair and in a safe condition for public travel to expend not less than the sum of \$20,000.00; and,

“WHEREAS, It appears that the amount of money that can be raised by levying the maximum rate provided for by law for road purposes will be entirely insufficient to keep the public highways of Ada County in repair and in a safe condition for public travel, and that it will be necessary for this board to cause to be transferred from the current expense fund

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of said Ada County to the road fund the sum of at least \$12,000.00 for road purposes;

“Now, THEREFORE, BE IT RESOLVED, That for the purpose of providing sufficient finances to keep the roads and bridges of Ada County, State of Idaho, in repair and in a safe condition for public travel during the fiscal year beginning on the second Monday in January, 1910, the amount of \$12,000.00, be, and the same is hereby transferred from the current expense fund of said Ada County for said fiscal year for the county road fund for said year. The said sum of \$12,000.00, so transferred to the county road fund to be used to meet the necessary cost and expenses of constructing, maintaining and repairing roads and bridges during the said fiscal year.

“And be it further resolved, That a special tax not to exceed one-half of one per cent on the taxable property of said Ada County be levied annually until the said amount of \$12,000.00 so transferred from the current expense fund to the county road fund is raised and paid.”

The cause was tried in the district court and the order of the board of county commissioners was sustained and affirmed. From that judgment this appeal was taken. It is contended by appellant that the board of county commissioners had no authority to make the order appealed from, for the reason that such order was made by reason of the provisions of an act approved Mar. 16, 1909 (Laws of 1909, p. 274), commonly known as “The Good Roads Law,” which act is inoperative and void.

It may be conceded that if what is known as “The Good Roads Law” is void, then the county commissioners had no authority to enter the order appealed from and the same should be annulled and set aside. Referring to this act it will be observed that two methods are provided for raising revenue for road purposes; the first is by levying a road tax which shall not exceed eighty cents on each one thousand dollars of the assessed valuation of the property taken from the assessment-roll for the preceding year; the second, by issuing bonds of the county upon a two-thirds vote of the electors of the county, and the creation of special taxing districts extend-

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ing along the course of a road or highway, and by levying a special tax upon the lands within said district to pay such proportion of such bonded indebtedness as the board may determine. The second method thus provided for is embraced in the provisions of sec. 21 of this act, and it is the contention of appellant that this section is so indefinite, uncertain and incapable of execution that it is void, and because such section is void the entire act is void. By the provisions of this section it no doubt was the intention of the legislature to provide a method by which, when bonds were authorized to be issued by a vote of the electors of the county for the purpose of constructing or improving a particular line of road or a bridge, the cost of constructing or improving such road should be partly assumed and paid by the county as a whole, and partly assumed and paid by a taxing district, including certain lands especially benefited by the construction of such road. After providing for the method of voting bonds said section provides: "And in addition may provide for the creation of a special taxing district, extending along the course of such road, or highway; such taxing or assessment district shall consist of the land and property which shall abut such highway, when it shall have been constructed, and all other lands near by, which, in the judgment of the commissioners, will be especially benefited by such highway. Such special taxing or assessment district shall be subject and liable to such proportion of the indebtedness created by such bond issue, and in such degree as the board shall designate in such resolution, and such bonds shall constitute a lien on all taxable property therein, as to such proportion so designated by the board of county commissioners. The board shall direct the road supervisor to prepare a map, to be filed with the clerk of the board, showing the tracts of land therein included, and the assessed owners thereof, and giving the definite boundaries of such district with reference to the legal subdivisions, which map shall be incorporated by reference into the resolution authorizing the bond issue. And such boundaries, and the land included therein, shall thereafter constitute such special taxing or assessment district."

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It will be observed that this section provides for the creation of a special taxing district, and that such district shall be subject and liable to such proportion of the indebtedness created by such bond issue and in such degree as the board shall designate in such resolution; and such bonds shall constitute a lien on all taxable property therein. There is no provision, however, made in said section which requires or makes it the duty of the board of county commissioners to levy a special tax to discharge such lien. No method is provided for or designated as to the manner of levying this tax or the collection of the same, and no machinery is outlined for carrying into execution the levying or collecting of the special tax to be levied against the lands within said taxing district. It is impossible to determine how the special tax shall be levied or distributed, and how or in what manner it shall be collected or by whom, or what shall be done with the money to be thus collected. In other words, the section standing alone fails to provide any machinery for carrying into execution the provisions with reference to the special tax to be levied in the taxing district. This is the only section found in the act which deals with the subject of assessment districts or the levying of a special tax within such district. If bonds, therefore, were voted by the county, there is no method provided for paying the proportion of the indebtedness created by such bond issue, designated to be paid by the taxing district, in the order or resolution of the board authorizing a vote to be taken as to the issuance of such bonds. It requires no extended argument to prove that this section provides no means for its execution. A casual reading of such section is sufficient proof.

It was conceded upon the argument by counsel for respondent, as well as special counsel who presented a brief upon behalf of the good roads association as *amicus curiae*, that such is a fact. But it is argued by counsel for respondent and also by counsel for the "Ada County Good Roads Association" that even though sec. 21 be void, still it is the duty of the court not to declare the statute as a whole void unless the nullity and invalidity are beyond reasonable doubt. This

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is now the settled law of this state. (*Gillesby v. Board of Commrs.*, 17 Ida. 586, 107 Pac. 71.)

It is also settled in this state that if the provisions of an act are connected in subject matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other, then if one part falls the entire act must fall. (*Ballentine v. Willey*, 3 Ida. 496, 95 Am. St. 17, 31 Pac. 994; *Knight v. Trigg*, 16 Ida. 256, 100 Pac. 1060; *Gillesby v. Board of Commrs.*, 17 Ida. 586, 107 Pac. 71.) If, therefore, taking this statute as a whole, it clearly appears that sec. 21 was considered and recognized by the legislature as an important and integral part thereof, and so connected in subject matter with other provisions of the act, and other provisions were so dependent upon sec. 21, that it cannot be presumed that the legislature would have passed said act with such section omitted, then the entire act must fall.

Under the road law as it existed prior to the adoption of the act now under consideration, the board of county commissioners were authorized to levy a tax for road purposes of not less than ten nor exceeding sixty cents on each one hundred dollars of valuation. Under the good roads law now under consideration, the board is authorized to levy a tax for road purposes to not exceed eighty cents on each one thousand dollars of valuation. There must have been some reason for this decided and great reduction in the general levy the board were authorized to make, and an examination of sec. 21 clearly discloses such reason. This section provides for the creation of special taxing districts, and authorizes the issuance of bonds upon a vote of the electors of the county for the construction of roads and bridges within such district and the levying of a special tax within said district to aid in paying such bonds.

The legislature no doubt were of the opinion that the creation of special taxing districts and the issuing of bonds as provided by this section would make it unnecessary to authorize the board of commissioners to levy so high a tax for general road purposes. In other words, the general levy was

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reduced in contemplation of the bond issue and the creation of the special taxing districts, and sec. 21 is intended to supplement sec. 20, each depending upon the other, and so connected that if sec. 21 falls the purpose of the legislature in enacting said good road law has been defeated. These two sections were clearly designed by the legislature to operate for the same purpose, that is, to provide the method of creating a fund for the construction and maintenance of the roads of the county. In our opinion, these two sections are so dependent in meaning that it clearly appears that the legislature would not have passed one without the other. If these two sections are obliterated, then the act has no force whatever, because no provision is left for raising funds for road work.

It is, however, argued by counsel for respondent that although sec. 21 is void, yet the remainder of the act should be upheld, because Rev. Codes, sec. 937, provides means by which sufficient funds can be covered into the road fund to supply the loss occasioned by reason of the defeat of the bond proposition. This section among other things provides: "Whenever it appears to the board of county commissioners that the road fund is or would be unreasonably burdened by the expense of constructing, or of maintaining and repairing, any bridge or road, . . . the said board may, in its discretion, cause a portion of such cost or expense to be paid out of the current expense fund of the county, and may levy a special tax" to pay the same.

This, however, does not answer the contention that sec. 21 of the good roads law is an essential part thereof, and was an inducement which led the legislature to enact such law, because if that be true, then the entire act must fall and the provisions of Rev. Codes, sec. 937, cannot save the law. This section was intended as an emergency provision, and authorizes the board of county commissioners to cause a portion of the cost of constructing, maintaining and repairing any bridge or road to be paid out of the current expense fund when the road fund would be unreasonably burdened by such expense. The emergency, however, contemplated by this section was such as arises by reason of destruction or injury to roads or

bridges previously constructed. It was not intended to authorize the transfer of funds from the current expense fund to the road fund for the purpose of creating a sufficient road fund to inaugurate a new plan or system of constructing or building roads throughout the county. Neither was it intended that the board should be authorized to make such transfer to replace funds lost to the road fund by reason of inoperative or void acts of the legislature. When this section was enacted the legislature certainly did not anticipate that the road fund of the county would be burdened on account of the legislature passing inoperative or void acts affecting the means and method of providing a road fund, but rather had in mind emergencies which might arise out of the action of the elements in destroying or injuring roads or bridges. It was clearly within the power of the legislature to authorize the board of commissioners to levy a higher rate of taxes for general road purposes, and the legislature has the constitutional power to determine the extent of such levy. The mere fact that the levy provided by the legislature will not raise a sufficient amount of money to keep the roads of the county in that state of repair in which the board of commissioners believe they should be kept, would not be a reason why the board of commissioners could draw upon the current expense fund, and was not the emergency contemplated by the provisions of sec. 937, *supra*.

We have carefully examined the act involved in this case with a view of giving it effect, as it appears to have been the intention and desire of the legislature in enacting such statute to provide means for better roads, but we cannot do so without trespassing upon the powers of the legislature. As said by the court in *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652:

“A statute must be capable of construction and interpretation; otherwise, it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning,



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Points Decided.

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the court is not at liberty to supply—to make—one. The court may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will."

And as was said by the supreme court of Montana in *Hilburn v. St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551: "So, if an act of the legislature is so vague and uncertain in its terms as to convey no meaning, or if the means for carrying out its provisions are not adequate or effective, or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative." (*State v. West Side St. Ry. Co.*, 146 Mo. 155, 47 S. W. 959; 1 Lewis' Sutherland, Stat. Const., sec. 86.)

From what has been said it follows that the judgment of the district court is *reversed*. Costs awarded to *appellant*.

Sullivan, C. J., and Ailshie, J., concur.

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(April 29, 1910.)

JOE CRAESAFULLI, Respondent, v. WINSTON BROTHERS COMPANY, Appellant.

[108 Pac. 740.]

INJURY TO EMPLOYEE—NEGLIGENCE OF MASTER—FELLOW-SERVANT—  
ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

(Syllabus by the court.)

1. *Held*, under the facts of this case that it was the duty of master to see that the scaffold from which the defendant fell and was injured was safely erected.

2. *Held*, that the fellow-servant doctrine, assumption of risk and contributory negligence rules are not applicable to the facts of this case.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Wm. W. Woods, Judge.

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Argument for Appellant.

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Action to recover damages for an injury alleged to have occurred because of the negligent manner in which appellant had erected a scaffold for the purpose of timbering a tunnel. Judgment for plaintiff. *Affirmed.*

Kerns & Ryan, for Appellant.

The burden of proof is on the plaintiff, where an employee sues for personal injuries alleged to be caused by defective appliances, to prove the employer's failure to exercise the reasonable care required of him by law with respect to such appliances and machinery, and if the appliances are of such common use and not of the character that are used by skilled laborers or workmen, but such as every person is supposed to be familiar with, the same degree of care, if any, is not required. (*Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Baltimore etc. R. Co. v. Jones*, 95 U. S. 439, 12 L. ed. 506; 20 Am. & Eng. Ency. of Law, 86, 87, and cases cited; Labatt on Master and Servant, sec. 832; *State v. Malster*, 57 Md. 287; *A. T. & S. R. Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411.)

If the circumstances relied upon to show negligence are consistent with ordinary care on the part of the master, the charge of negligence will fail for want of proof. (20 Am. & Eng. Ency. of Law, 87, 88; *Kincaid v. O. S. L. R.*, 22 Or. 35, 29 Pac. 3.)

The defendant had the right to use any sort of appliances it saw fit, and if there was any defect in the appliances, the plaintiff assumed the risk by continuing to work therewith. (*O'Rourke v. U. P. Ry. Co.*, 22 Fed. 191; *Alcorn v. Chicago Ry. Co.*, 108 Mo. 81, 18 S. W. 191; *Baltimore etc. Ry. Co. v. State*, 75 Md. 152, 32 Am. St. 372, 23 Atl. 310; *Gibson v. Erie Ry. Co.*, 63 N. Y. 453, 20 Am. Rep. 552.)

There is nothing to show that the shift boss did not direct that the ladder and plank be erected in the usual and best manner. We have a right to presume, in the absence of any evidence to the contrary, that he did so.

"Where the evidence shows that the acts complained of resulting in the injury were attributable to a fellow-servant, the

## Argument for Appellant.

employer cannot be held to respond in damages for such injury." (*Zienke v. N. P. Ry. Co.*, 8 Ida. 54, 66 Pac. 828; *Larsen v. Le Doux*, 11 Ida. 49, 81 Pac. 600.)

"Before a servant can recover he must show that the injury did not arise from a defect obvious to himself or which by the exercise of ordinary care he might have known; and he must show it was not from hazard incident to the business." (*Minty v. U. P. R. Co.*, 2 Ida. 471, 21 Pac. 660, 4 L. R. A. 409; *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361, 363.)

"A shift boss in charge of a gang of men whose duty it is to direct the men when, where and how to work, to supervise them in their labor and to see that they properly perform it . . . is a fellow-servant of the men on his shift, the risk of whose negligence they assume." (*Weeks v. Scharer*, 111 Fed. 330, 49 C. C. A. 372; *Anderson v. Winston*, 31 Fed. 528.)

Where it appeared that plaintiff was injured by the falling of a plank, but there was no evidence as to how it happened to fall, there could be no recovery. (*McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40.)

Where the place that an employee is to work is a room in a coal mine or other mine, or tunnel, the place is provided in the progress of the work by the employees themselves. It is made secure or otherwise by the way in which they perform their respective duties. It is just like the scaffold upon which painters or builders stand in prosecuting their work. (*Shaw v. Min. Co.*, 31 Mont. 138, 77 Pac. 515; *Cummings v. Reduction Co.*, 26 Mont. 434, 68 Pac. 852.)

"A mere foreman or boss of a gang of men working in a mine, employed in the same department of business and under a common head, is a fellow-servant with them, whether he has or has not authority to engage and discharge the men under him." (*Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. ed. 390; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 773; *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. ed. 612.)

## Argument for Respondent.

Featherstone & Fox, and Gray & Knight, for Respondent.

There is a duty devolving upon the master to furnish a servant with a reasonably safe place in which to work. This is a positive duty and cannot be delegated, and if the master attempts to delegate that duty to any person of whatsoever rank, the acts of such a person in this respect are the acts of the master, and the master consequently responsible. (*Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. ed. 470, 18 Morr. Min. Rep. 165; *Norman v. Wabash R. Co.*, 62 Fed. 728, 10 C. C. A. 617; *Railway Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; *Western Coal Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Rowden v. Schoenherr Mining Co.*, 136 Mo. App. 376, 117 S. W. 695; *Crist v. Wichita Gas etc. Co.*, 72 Kan. 135, 83 Pac. 200; *Crawford v. Bonners Ferry Lumber Co.*, 12 Ida. 678, 87 Pac. 998, 10 Ann. Cas. 1.)

It is the absolute duty of the master to furnish safe scaffolds, unless by the contract of employment the servant has assumed such duty. The master is not absolved from the consequences attendant upon his failure to do so by having merely furnished sufficient suitable material. (*Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 765; *Chicago etc. Ry. Co. v. Maroney*, 170 Ill. 526, 62 Am. St. Rep. 396, 48 N. E. 953; *McBeath v. Rawle*, 192 Ill. 626, 61 N. E. 847, 69 L. R. A. 697; *Donahue v. Buck & Co.*, 197 Mass. 550, 83 N. E. 1090, 18 L. R. A., N. S., 476; *Thompson v. Bartlett*, 71 N. H. 174, 93 Am. St. 504, 51 Atl. 633; *Kansas City Car & Foundry Co. v. Sawyer*, 7 Kan. App. 146, 53 Pac. 91; *Blackman v. Thompson etc. Co.*, 102 Ga. 64, 29 S. E. 120; *Bloomquist v. Chicago etc. Ry. Co.*, 60 Minn. 426, 62 N. W. 818; *Carlson v. Northwestern Tel. Exchange*, 63 Minn. 428, 65 N. W. 914; *Lindvall v. Wood*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793; *McNamara v. Macdonough*, 102 Cal. 575, 36 Pac. 941; *Withiam v. Tenino Stone Quarry*, 48 Wash. 127, 92 Pac. 900.)

The servant does not assume all of the risks of his employment, but only such as are usual, ordinary and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are obvious and

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expose him to danger so imminent that an ordinarily prudent man would anticipate injury as so probable that he would not enter upon or remain in the employment. (*Malott v. Hood*, 201 Ill. 202, 66 N. E. 247; *Clark v. Wolverine Portland Cement Co.*, 138 Mich. 673, 101 N. W. 845; *Revolinski v. Adams Coal Co.*, 118 Wis. 324, 95 N. W. 123; *Drake v. San Antonio & A. P. Co.*, 99 Tex. 240, 89 S. W. 409.)

SULLIVAN, C. J.—This action was brought to recover damages in the sum of \$1,975 for injuries alleged to have been sustained by the plaintiff on or about the 2d day of December, 1908, while in the employ of the appellant corporation, by reason of his having fallen from a scaffolding when engaged in holding a plumb-line for the purpose of plumbing a post used in timbering a tunnel. The appellant at the time of the injury was engaged in driving what is known as the St. Paul Pass Tunnel on the Chicago, Milwaukee & St. Paul Railway through the Bitter Root mountains, which mountains form the dividing line between the states of Montana and Idaho. The accident occurred on the Montana side of the dividing line.

It appears from the record that said tunnel was driven in substantially the following manner:

There was what is known as the heading, which was the upper or forward section; below this and several hundred feet behind the face of the heading was the bench or lower portion. This tunnel was permanently timbered as near up to the face of the bench or lower portion of the tunnel as practicable; sometimes within a few feet of the breast of the bench. The permanent timbers were set from two to four feet apart, as the exigencies of the case demanded, and were erected as follows: First, a permanent foot block or mud sill was placed on the floor of the tunnel. Upon this was set what is known as the plumb-post or permanent timber 12x12 in. square. The post was raised and driven in at the top under the wall-plate by the use of hammers. In order then to plumb the post a scaffold or staging was erected along the sides of the tunnel as follows: A piece of lagging was nailed

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between two plumb-posts on each side of the tunnel, and on this was placed what is known as a spreader or cross-piece (a piece of timber 4x6 inches) crosswise of the tunnel. Against the face or breast of the bench a ladder was placed, and from this spreader a plank (4x6) was placed, resting one end upon the spreader and the other on a rung of the ladder. Upon the staging a man was sent with a plumb-line which he would hold up against the wall-plate while the other men would hammer the post into line.

Supervising the entire construction of the tunnel was a shift boss, who had authority to hire and discharge men working in said tunnel. The men were classified as machine-men, helpers, muckers, steam shovel engineers, cranemen, skimmers, switchmen, motormen, breakmen, nippers and ditchmen. The respondent was a mucker. The evidence shows that the shift boss was intrusted with the duty of supervising the men, directing the work, pointing the holes for the air drills and had general supervision of the work. It appears that under this shift boss there were from thirty-five to forty-five men. The staging used for the purpose of plumbing the plumb-posts was constructed by the men at work under direction of said boss. The shift boss directed the respondent to take the plumb-line and go upon the scaffolding and assist in plumbing the posts, and while engaged in that work, the testimony shows that he felt the plank on which he was standing move; he called to the shift boss informing him of that fact, and the shift boss told him to climb on one of the cross-pieces. The scaffolding fell immediately and before he had time to do as directed by the boss. The result to the respondent was what the physicians call a Pott's fracture, being a small fracture of the lower end of the fibula, that is, the external bone of the leg. About two inches of it was broken from the shaft of the bone. The bone was properly set, the case properly cared for and the respondent suffered no permanent injury.

The case was tried before a jury and a verdict was rendered in his favor in the sum of \$800, and judgment was entered accordingly. A motion for a new trial was overruled

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by the court, and this appeal is from the judgment and order denying the new trial.

Eleven errors are assigned which go to the admission and rejection of certain testimony, denying the motion for a non-suit, the giving and refusing to give certain instructions, and the sufficiency of the evidence to sustain the verdict.

It is alleged in the complaint that the scaffold from which the respondent fell was erected by the appellant; that it was unsafe and insecure, and that the ladder upon which one end of the plank from which the respondent fell was improperly and insecurely set or fastened thereto, and that said scaffold was improper and insufficient for the purpose for which it was constructed. It is contended that respondent failed to prove said allegations. As to who actually erected the scaffold, there is some conflict in the evidence. The plaintiff testified that he assisted in erecting the scaffold on the left-hand side of the tunnel and that he did not assist in erecting the one on the right-hand side from which he fell. The shift boss, Newhouse, was present, and when the muck had been cleared away, he directed the men to erect the scaffolds and to plumb the posts. There is some evidence tending to show that the shift boss assisted in putting up the scaffold that fell, but we think the evidence all taken together shows that the muckers and other workmen there erected that scaffold under the direction of the shift boss, and that the plaintiff did not assist in erecting it. The question is then presented whether it was the duty of the shift boss, as a representative of the appellant, to see that said scaffold was safe and whether that was a part of the duty devolving upon the master.

Newhouse testified that he had thirty-five to forty-five men under him, and that his duties were to supervise the work in connection with everything that the men he had under him were required to do. His testimony is a little indefinite as to just what his duties were, but witness Phelan, who testified on the part of the plaintiff and had acted as shift boss, testified that the duty of the shift boss was to show the men what to do, and that the duty of the muckers was to do

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what the shift boss told them; that the shift boss had charge of the setting of the ladder and the plank, and is supposed to look out for them and see that they are safe, and testified as follows: "As to what must be done in order to make that plank safe for a man to go up and stand on it and hold the plumb-bob, will say you are supposed to make the ladder safe in the first place, see that the two legs are set down on good, solid ground, and then put the plank across and block it so that it can't move. If that ladder is properly placed, as I have stated, and the plank is properly fixed, the plank cannot slip off the ladder or the ladder fall down." It will be observed that this shift boss testified that it was the duty of the shift boss to see that the ladder and planks composing the scaffold were put up in a safe condition. He also testified that the ladders never looked safe to him. The witness Newhouse gave his opinion as to what caused the board to fall, as follows: "What caused the board to fall was that the plank rested about eight or ten inches on the top of the spreader, and this here ladder evidently was not placed solid on the top against the rocks, and it was caught somewhere above the center and the ladder leaned against the rock and pressed over the top, and therefore pulled the plank along with it, and the end of the plank dropped off that spreader and dropped four or five steps down the ladder; at the same time the ladder still remained standing up."

The evidence also shows that the respondent had been at work in that tunnel as a mucker and had assisted very often in erecting the scaffolds and in plumbing the posts for about four months. It also shows that on the day the accident occurred, all except two or three of the men who were working there with him had only been at work there for two or three shifts. This would indicate that they were not very familiar with the method of erecting the scaffolds for plumbing the posts. It also may be inferred from the evidence that the scaffold from which the plaintiff fell was erected by those inexperienced men, this shift boss Newhouse being present and directing the work. From the testimony of Phelan, it appears that with the exercise of ordinary care,



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the shift boss could have made the staging safe, and that it was the duty of the shift boss to do so.

We conclude from all of the evidence, there being a conflict upon some of the material points, that it was the duty of the appellant to see that said scaffold was safe. If the ladder had been properly set and the plank that formed the floor of the scaffold had been properly blocked, the evidence shows that the accident would not have occurred, and we think from the facts as shown by the record that it was the duty of the appellant to see that the scaffold was properly erected. Had the respondent fallen from the platform that he had erected himself, a different question would be presented. The evidence shows that the platform from which respondent did fall was erected by inexperienced men and under the facts it was the duty of the shift boss, for his principal, to see that the same was safely erected. The allegations of the complaint were established by the evidence, and the verdict was fully supported by it.

It is contended that the fellow-servant doctrine, assumption of risk and contributory negligence rules apply to the facts of this case. We cannot agree with counsel in that contention, as it is clear to us that the rules applicable to the doctrines mentioned are not applicable to the facts of this case. Under those facts, it was the duty of the master to see that said staging was made safe for the purposes for which it was erected.

Having arrived at that conclusion, it will be unnecessary for us in this opinion to take up each specific error assigned and pass upon it. However, we have examined all of the errors assigned, and fail to find reversible error in the record. The judgment is therefore affirmed, with costs in favor of respondent.

Stewart and Ailshie, JJ., concur.

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Points Decided.

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(May 2, 1910.)

WILLIAM E. FOORE, Appellant, v. SIMON PIANO CO.,  
Respondent.

[108 Pac. 1038.]

ATTACHMENT AGAINST NONRESIDENT—AFFIDAVIT FOR ATTACHMENT  
AGAINST NONRESIDENT—INDORSEMENT OF NAME OF ATTORNEY ON  
SUMMONS—JUDGMENT IN REM—POSTING NOTICE OF ATTACHMENT  
—EXCESSIVE LEVY—EXECUTION SALE—COLLECTION OF DEBT BY  
FOREIGN CORPORATION.

(Syllabus by the court.)

1. Under the provisions of secs. 4302 and 4303, Rev. Codes, an attachment may be had against a defendant not residing in this state in an action upon a judgment or upon a contract express or implied, and in such case it is not necessary to show by the affidavit for attachment that the plaintiff has no security for the debt.

2. Where a summons or an *alias* summons is published by order of the court and the name of the attorney for the plaintiff as indorsed on the summons does not appear in the summons as published, the omission is not fatal to the jurisdiction, and does not invalidate the service by publication. The provision of subd. 5, sec. 4140, requiring that "the name of plaintiff's attorney, with his postoffice address or residence, must be indorsed on the summons," is directory and not mandatory.

3. Where constructive service of summons has been had by publication against a nonresident defendant and property within the state has been attached under a writ of attachment regularly issued in conformity with the requirements of the statute, the jurisdiction of the court attaches *in rem* to the extent of the property attached, and a judgment entered under the constructive service of summons is valid and binding to the extent of the *rem*.

4. The notice of the issuance of a writ of attachment required to be given by the clerk under the provisions of sec. 4304, Rev. Codes, is intended for the protection and benefit of other creditors of the defendant, and a failure to give notice is not available to the defendant in the attachment proceeding, and does not enable him to avoid the attachment or subsequent execution sale thereunder.

5. The question as to whether or not an excessive levy has been made under a writ of attachment is one to be presented to the

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Argument for Appellant.

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court from which the writ issued and in which the action is pending, and cannot be raised by the defendant after an execution sale and in a collateral or independent action.

6. The question as to whether or not several lots or tracts or parcels of land have been sold together under one bid instead of separately, as required by sec. 4484, Rev. Codes, is a question properly to be presented to the court from which the execution issued and on a motion to set aside the sale for the irregularity. It cannot be raised for the first time on appeal either in the same or a collateral proceeding.

7. The provisions of sec. 10, art. 11, of the state constitution and of sec. 2792, Rev. Codes, prohibiting a foreign corporation "doing business in this state" without first filing its articles of incorporation and designating an agent, do not apply to a foreign corporation doing interstate business or a corporation that sells an article in another state to a citizen of this state and which thereafter finds it necessary to resort to the courts of this state for the collection of the debt.

8. Sec. 2792, Rev. Codes, which prohibits a noncomplying foreign corporation from taking title to realty within this state prior to filing its articles, does not apply to a foreign corporation which bids in real estate at execution sale for the collection of a judgment due to the corporation, and which judgment arises out of an interstate transaction.

APPEAL from the District Court of the First Judicial District of the State of Idaho, for the County of Shoshone. Hon. W. W. Woods, Judge.

Action by plaintiff to vacate a judgment and set aside a sale made on execution and cancel a sheriff's deed, and to quiet his title to certain lands sold under execution. Judgment for the defendant, and plaintiff appeals. *Affirmed.*

Gray & Knight, J. L. M'Clear, and William K. Shissler, for Appellant.

This court has repeatedly held that the reservation of title in a vendor creates such a lien in his favor as bars him from resorting to attachment under our statute. (*Willman v. Friedman*, 3 Ida. 734, 35 Pac. 37; *Barton v. Groseclose*, 11 Ida. 227, 81 Pac. 623; *Mark Means etc. Co. v. Mackenzie*, 9 Ida. 165, 73 Pac. 135; *Porter v. Brooks*, 35 Cal. 199; *Barbieri*

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Argument for Appellant.

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*v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *Gessner v. Palmater*, 89 Cal. 89, 26 Pac. 789, 13 L. R. A. 187; *Ferguson v. Blood*, 152 Fed. 98, 82 C. C. A. 432.)

In the attachment suit the defendant was entitled to the best and every notice provided by law. Failure on the part of respondent to publish the name of its attorney was a substantial defect in the notice. Any defect or failure to perform the strict requirements of the statute is a failure to give the defendant the best notice provided by law, and a judgment which assumes to take his property upon the publication of such notice amounts to the taking of his property without due process of law. (*Choate v. Spencer*, 13 Mont. 127, 40 Am. St. 415, 32 Pac. 651, 20 L. R. A. 424; *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. 645, 52 Pac. 558; *Sanford v. Edwards*, 19 Mont. 56, 61 Am. St. 482, 47 Pac. 212; *Strode v. Strode*, 6 Ida. 67, 96 Am. St. 249, 52 Pac. 161; *Mills v. Smiley*, 9 Ida. 325, 76 Pac. 783.)

The judgment in the attachment suit is void. The statute was not complied with. By the failure of the respondent and its attorneys to give notice provided by law one of the means by which appellant might have been advised of the pendency of the proceeding against his property was cut off. (*Yerkes v. McFadden*, 141 N. Y. 136, 36 N. E. 7; *Haywood v. McCrory*, 33 Ill. 459; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621.)

Statutory provisions with reference to attachment are mandatory and must be strictly complied with. (*Murphy v. Montandon*, 3 Ida. 325, 35 Am. St. 279, 29 Pac. 851; *Kerns v. McAulay*, 8 Ida. 568, 69 Pac. 539; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Shockley v. Bulloch*, 18 Ga. 283; *Jaffray v. Jennings*, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; *Marnine v. Murphy*, 8 Ind. 272.)

The proceeding by which the jurisdiction is initiated should show affirmatively that the defendant has property within the state. (*Cassidy v. Woodward*, 77 Iowa, 354, 42 N. W. 319; *Lutz v. Kelly*, 47 Iowa, 307; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. ed. 338.)

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Argument for Respondent.

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"When real property consists of several known lots or parcels, they must be sold separately, or offered for sale in parcels." (Rev. Codes, sec. 4484; *Ollis v. Kirkpatrick*, 3 Ida. 247, 28 Pac. 435; *Odell v. Cox*, 151 Cal. 70, 90 Pac. 194.)

The several transactions of the respondent within the state of Idaho clearly constitute such a doing of business as takes the transactions out of the class of cases which are held to be interstate commerce, and respondent is therefore bound by the provisions of our statute with reference to the filing of articles of incorporation in this state. (*Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707; *War Eagle Con. Min. Co. v. Dickie*, 14 Ida. 534, 94 Pac. 1034.)

Looking at the substance of this action the court will find that it is a direct attack upon the judgment in the attachment suit. Being a direct attack, under the authority of *O'Neill v. Potvin*, 13 Ida. 721, 93 Pac. 20, 257, the want of jurisdiction to render the judgment may be shown even though it does not appear upon the face of the judgment-roll.

Kerns & Ryan, Samuel R. Stern, and Franklin Pfirman,  
for Respondent.

The action is without question a collateral attack upon the former judgment. (*O'Neill v. Potvin*, 13 Ida. 725, 93 Pac. 20, 257; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.)

In case the writ of attachment is brought against the property of a nonresident, it is sufficient to set forth in the affidavit just what is required by the second subdivision of said section 4303, and no more. (*Kerns v. McAuley*, 8 Ida. 568, 69 Pac. 539; *Ross v. Gold Ridge Min. Co.*, 14 Ida. 687, 95 Pac. 821; *Vollmer v. Spencer*, 5 Ida. 557, 51 Pac. 609.)

Our statute does not require that an alias summons must be indorsed, except by inference, and if such indorsement is required, such defect in form is not fatal or jurisdictional if the same cannot mislead anyone interested in the litigation. (*McKnight v. Grant*, 13 Ida. 629, 121 Am. St. 287, 92 Pac. 989; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *Hill v. Morgan*, 9 Ida. 718, 76 Pac. 323.)

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Statement of Facts.

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No question was raised by the pleadings as to the execution sale, and the appellant cannot for the first time bring the matter to the attention of this court. "The proper remedy to set aside a judicial sale which has been wrongfully made, prior to the making of the sheriff's deed, is by motion in the principal action." (*Wooddy v. Jameson*, 5 Ida. 466, 50 Pac. 1008.)

In this case there is no allegation whatever in relation to the manner of sale or the value of the property sold. (*Booker v. Bass*, 127 Ga. 133, 56 S. E. 283; *People v. Owyhee Lumber Co.*, 1 Ida. 420; *Leppel v. Kus*, 38 Colo. 292, 88 Pac. 448.)

The respondent was not obliged to comply with the requirements of the state of Idaho relative to foreign corporations, in order that it might sell an Apollo piano player and a lot of music within said state; it had the right to engage in interstate commerce. (*Toledo Computing Scale Co. v. Young*, 16 Ida. 187, 101 Pac. 257; *Bell City Mfg. Co. v. Frizzell*, 11 Ida. 1, 81 Pac. 58; *In re Kinyon*, 9 Ida. 642, 75 Pac. 268; *In re Abel*, 10 Ida. 288, 77 Pac. 621.)

If the defendant had the right to engage in interstate commerce it necessarily had the right to enforce the collection of its debts. If it became necessary, in order to enforce collection of its debts, to purchase property upon which execution had been levied, it had the right to hold or dispose of such property. (*Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Elston v. Piggott*, 94 Ind. 14; 19 Cyc. 1240, and note.)

It has also been held that a foreign corporation does not do business in the state by merely purchasing property at a judicial sale. (19 Cyc. 1281; *Meddis v. Kinney*, 176 Mo. 200, 98 Am. St. 496, 75 S. W. 633.)

## STATEMENT OF FACTS.

This action was instituted by the appellant, who was plaintiff in the lower court, to procure the cancellation of a default judgment entered against him on the 6th day of January, 1905, and in favor of the respondent in this case, the Simon Piano Co. Plaintiff also prayed for the cancellation of sheriff's deed that had been executed and delivered under execution sale and to quiet his title to the lands sold

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Statement of Facts.

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in satisfaction of the judgment. On the 30th day of June, 1904, the appellant was a resident of Alberta, Canada, and was at that time the owner of 320 acres of timber land situated in Shoshone county and which was subsequently sold under the execution involved in this case. Prior to the departure of appellant for Alberta, he had been a resident of Coeur d'Alene city, Kootenai county, and while residing at the latter place and on the 9th day of December, 1902, he purchased from the respondent corporation an automatic music machine, called an "Apollo." This Apollo was purchased under a conditional sale contract, by the terms of which title remained in the piano company until the final payment should be made. On the 30th day of June, 1904, the Simon Piano Co., a foreign corporation, filed its complaint in the district court of the first judicial district of this state in and for Shoshone county, against the appellant herein, in which complaint it alleged that the defendant therein was indebted to the plaintiff in the sum of \$110.05, together with interest thereon from the 7th day of June, 1904, at the rate of 7% per annum. This action was prosecuted for the collection of the alleged balance due from the appellant herein to respondent on the conditional sale contract for the Apollo. On the same date an affidavit for attachment was made and filed with the clerk, and a summons and writ of attachment were issued, and the writ of attachment was levied on the real estate involved in this present action. On July 16th following, the summons was returned, the officer stating thereon that it had not been served, for the reason that after diligent search and inquiry defendant could not be found within Shoshone county. Thereafter and on the 11th day of October, affidavit for publication of summons was made and filed, and an order for publication of summons was thereupon made by the probate judge, and thereafter a summons designated as "an alias summons" was duly published in the "Idaho Press," a newspaper printed and published in Shoshone county. The summons as published did not show the name of the attorney for the plaintiff as the same had been indorsed on the summons. Notice of the issuance of the writ of attachment was

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not posted or published by the clerk of the district court as required by the provisions of the statute, sec. 4304, Rev. Codes. Judgment by default was entered in that action against the appellant herein and in favor of the Simon Piano Co. for the amount demanded, and execution was issued and levied on a tract of land comprising 320 acres, which was sold in one body to satisfy the judgment and was bid in by the plaintiff in that case, the Simon Piano Co. The plaintiff in the attachment suit had not complied with the foreign corporation laws of this state at the time of the prosecution of its action, nor did it until some time after the execution sale. The appellant appears to have had no actual notice of the pendency of the action or of any proceedings had thereunder until the month of June, 1906, and after the execution of the sheriff's deed. On September 26, 1906, appellant filed his complaint in this action to set aside the judgment and cancel the deed. The case went to trial on February 5, 1909, and was submitted, and findings and judgment were made and entered in favor of the respondent. This appeal was thereupon prosecuted.

AILSHIE, J. (After Stating the Facts.)—We shall consider the errors assigned in the order in which they are presented in the brief.

(1) Failure to find on all material issues.

The findings of the court cover all the issues that were essential to the final determination of this case. It was unnecessary for the court to find on questions which would not influence or affect the judgment to be entered. (*Brown v. Macey*, 13 Ida. 451, 90 Pac. 339.)

(2) Falsity of the affidavit for attachment.

It is contended by appellant that the affidavit for attachment in the original action was false and that the court had no jurisdiction to issue the writ. On this question there was a conflict of evidence, and the trial court found in favor of the defendant and that the sum alleged in the affidavit was in fact due at that time. This sufficiently disposes of that question. It is doubtful, however, if the truth of the affidavit



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in that respect could be inquired into at this time and in this manner.

(3) Attachment cannot be had by vendor who retains title.

It is contended by appellant that under the conditional sale contract the piano company retained title to the "Apollo" until the final payment should be made, and that under the statute of this state he could not have a writ of attachment until he had exhausted his security or the same had become valueless without any fault of the company. (*Mark Means Tsf. Co. v. McKenzie*, 9 Ida. 165, 73 Pac. 135; *Barton v. Groseclose*, 11 Ida. 227, 80 Pac. 623; *Peasley v. Noble*, 17 Ida. 686, 107 Pac. 402.) This position is correct as to a resident defendant but is not applicable to the facts of the present case. This was an action against a nonresident, and the attachment was sought on the ground that the defendant in the case was a nonresident of the state. Under the provisions of our statute, secs. 4302 and 4303, Rev. Codes, an attachment may be had "against a defendant not residing in this state" in an action upon a "judgment or upon contract, express or implied," and in such case it is not necessary to show that the plaintiff has no security. In other words, the provisions of subd. 1 of both sections 4302 and 4303 do not apply to a nonresident defendant. (*Kerns v. McAulay*, 8 Ida. 568, 69 Pac. 539; *Ross v. Gold Ridge Mining Co.*, 14 Ida. 687, 95 Pac. 821; and *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.)

In *Kohler v. Agassiz* the supreme court of California in passing upon the requirements of sec. 537 of the Code of Civ. Proc. of that state, which is in the same language as sec. 4303 of our Rev. Codes, said: "As against a nonresident defendant, the affidavit need not show that the payment of the claim is not secured by mortgage lien or pledge. . . ."

(4) Name of attorney in published summons.

It is next insisted by appellant that the *alias* summons as published did not contain the name of the attorney for the plaintiff as the same had been "indorsed on the summons." Subd. 5 of sec. 4140 of the Rev. Codes provides as follows: "The name of the plaintiff's attorney, with his post-

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Opinion of the Court—Ailshie, J.

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office address or residence, must be indorsed on the summons.” It is conceded that the summons published did not show the name of the attorney for the plaintiff as required by this provision of the statute. We think this requirement of the statute is directory rather than mandatory. The name of the attorney indorsed on the summons is not properly a part of the summons itself. Its only purpose is to advise the defendant of the name of the attorney who appears for the plaintiff and his residence or postoffice address. It is no part of the cause of action. The language of the statute would imply that the name is to be written across the back of the summons instead of appearing on the face thereof. The statute does not require the indorsements on the summons to be published. It only requires the *summons* to be published. It would be a proper practice, and is one that should be followed, to have the name of the attorney appear at the bottom of the published summons, but the failure to do so is not jurisdictional and is not fatal to the service. (*People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *McKnight v. Grant*, 13 Ida. 629, 121 Am. St. 287, 92 Pac. 989.)

(5) Was the judgment in the attachment suit void?

We answer this question in the negative. It is argued by appellant that the judgment obtained by the piano company against appellant here amounted to taking his property in violation of the fourteenth amendment to the federal constitution, in that it deprives him of his property without “due process of law.” This contention is without merit for the reasons hereinbefore set forth. While no personal service was had on the defendant in that action, a constructive service was had, and the attachment proceeding laid hold upon the property and the action *in rem* against the seized property was in conformity with the statute. The court acquired jurisdiction over the property thus seized, and while it could enter no personal judgment against the defendant, it could reach out with its process and subject the property within its jurisdiction to the payment of the indebtedness shown to exist. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Kerns v. McAulay*, 8 Ida. 558, 69 Pac. 539.)

(6) Failure of clerk to give notice of attachment.

It is contended by appellant that the failure of the clerk of the district court to give notice, by posting and publishing, of the issuance of the writ of attachment, as provided by sec. 4304 of the Rev. Codes, was fatal to the attachment and that no jurisdiction was therefore acquired in the attachment proceeding. The statute does not require that this notice issue contemporaneously with the writ of attachment. On the contrary, it provides as follows: "Two days after issuing such writ and delivering it to the proper officer, the clerk must post at the front door of the court-house, and cause to be published in some newspaper . . . a notice," etc. This notice is not issued to the defendant in the attachment proceedings nor is it for his benefit. The notice is not essential to give the writ validity and binding force. This notice is required solely in the interest of creditors of the defendant. The closing sentence of sec. 4304 indicates clearly this intention and provides the things to be done by any creditor who shall desire to "pro-rate with the attaching creditor." The statute requires that notice of the attachment be served upon the county recorder and that a copy thereof be also delivered to the party in possession of the property, or if there is no one in possession that it be posted on the land. (Sec. 4307, Rev. Codes.) This is the notice required to be given for the benefit of the defendant in the attachment proceedings whose property is seized. The presumption of law is that the party in possession is the representative of the defendant who is the owner of the land, and that notice to him that the land is attached will reach the owner. (*Pennoyer v. Neff, supra.*)

The defendant in the attachment proceeding is in no way injured or prejudiced by failure to post and publish the notice of attachment. Creditors of the defendant in the attachment proceedings, for whose benefit the notice is required to be given, are not complaining, and we take it that they are the only persons to be affected by failure to give such notice.

(7) Excessive levy.

It is argued by appellant that the writ was levied on an excessive amount of property and that it was so disproportion-

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Opinion of the Court—Ailshie, J.

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tionate in value to the amount of the debt sought to be secured that it avoided the writ. This contention cannot be sustained. The evidence does not disclose the value of the property at the time of the levy, and the only evidence as to the value of the land at the time of the sheriff's sale is the return on the execution, which shows that the highest and best bid received was \$296.57. The fact that the appellant testified at the trial of this present action that the land was then worth from ten to fifteen thousand dollars is not sufficient to invalidate a levy made four years prior to that time. The mere fact that a large amount of property was sold to satisfy a small indebtedness is of itself not sufficient to avoid the sale, especially when attacked in this collateral way.

(8) Validity of execution sale.

Appellant contends that this entire tract of land, comprising 320 acres or eight forty-acre tracts according to government survey, was all sold in one body and on one bid. He insists that under the provisions of sec. 4484 of the Rev. Codes this sale was void. The provisions of that section are as follows: "When the sale is of real property, consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold." This question was not presented by the pleadings and does not appear to have been raised in any manner in the lower court. It is now too late to raise it in this court. We may suggest in passing that it seems to us that the proper remedy would have been to move in the attachment suit in the lower court for an order vacating and setting aside the sale on the grounds indicated if the judgment debtor felt aggrieved by reason of the sale having been made in the manner pointed out, and to have there called the trial judge's specific attention to the failure to pursue the statutory method. The sheriff's return on the execution recites that he "sold the whole" tract of land therein described to the Simon Piano Co. and that it was the highest and best bidder. This does not necessarily negative the idea that it may have been

## Opinion of the Court—Ailshie, J.

offered or even sold in separate lots or tracts, or that if so offered no bids were received for the separate lots. It is clear that the judgment debtor did not avail himself of the right granted him by sec. 4484 of the code and "direct the order" in which the property should be sold. He had a right under the statute to require the sale to be made of specific tracts and to specify the order in which they should be sold.

(9) Rights of foreign corporation to buy property at execution sale to satisfy judgment.

It is insisted by appellant that since the Simon Piano Co., which is a foreign corporation, had failed to comply with the corporation laws of this state prior to the purchase of this real estate at execution sale, it is therefore precluded by sec. 2792, Rev. Codes, from taking and holding title to this land. The first thing to determine is whether or not the corporation was at the time this debt was contracted "doing business" within the state of Idaho within the meaning of the constitution (sec. 10, art. 11) or within the purview of sec. 2792, Rev. Codes. There is a conflict in the evidence as to whether the sale of the "Apollo" was made in Spokane in the state of Washington or at Coeur d'Alene city in this state. The court finds that the sale was made in Spokane, and this finding is amply justified by the evidence. It does not appear from the evidence that the corporation had any office in this state at that time, or that it had any agency established within the state. It rather appears that such sales as it was making at that time were made through the Spokane office and delivery was made there, and such sales were clearly interstate transactions. (*In re Kinyon*, 9 Ida. 642, 75 Pac. 268; *In re Abel*, 10 Ida. 288, 77 Pac. 621; *Belle City Mfg. Co. v. Frizzell*, 11 Ida. 1, 81 Pac. 58; *Toledo Computing Scale Co. v. Young*, 16 Ida. 187, 101 Pac. 257.) Under the provisions of the statute (sec. 2792, Rev. Codes) it is only corporations that are "doing business in this state" without first filing their articles of incorporation and complying with the statute that are prohibited from taking and holding title to realty acquired prior to the making of such filings. The mere purchase at execution sale of real property in satisfaction of a

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Points Decided.

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judgment procured on an interstate transaction is not in itself "doing business in this state." (19 Cyc. 1280, and note, also 1314; *Elston v. Piggett*, 94 Ind. 14; *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. 496, 75 S. W. 633.) The legislature has not undertaken to prohibit a corporation engaged in interstate business from taking title under judicial process in the collection of a debt where the corporation was not otherwise "doing business" in this state within the meaning of the constitution and statute.

The judgment should be affirmed, and it is so ordered. Costs awarded to respondent.

Sullivan, C. J., and Stewart, J., concur.

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(May 3, 1910.)

CLORA MARKLE DAHLSTROM, Plaintiff, and PORTLAND MINING CO., Defendant, Appellants, v. A. H. FEATHERSTONE, Petitioner, et al., Respondents.

[110 Pac. 243.]

APPELLATE PRACTICE—ORDER AFTER FINAL JUDGMENT—FINAL JUDGMENT—ATTORNEY'S FEE—ATTORNEY'S CHARGING LIEN—EQUITABLE LIEN ON JUDGMENT—PROCEDURE FOR ACQUIRING LIEN.

(Syllabus by the court.)

1. Where a final decree has been entered in a foreclosure suit awarding judgment and attorney's fees in favor of the creditor, and thereafter the judgment is satisfied of record by the judgment creditor in the manner provided by statute, and the court, on motion of the attorney who procured the judgment, vacates and sets aside the satisfaction of judgment and enters an order or judgment adjudging the attorney to be the equitable assignee of the judgment in the amount of fees still due him, and ordering an execution to issue out of the original action in favor of the attorney, such a judgment or order is a final judgment within the purview and meaning of subd. 1, sec. 4807, Rev. Codes, and an appeal may be prosecuted therefrom within one year from the entry of such judgment.

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Points Decided.

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2. A judgment in a foreclosure suit awarding attorney's fees to the judgment creditor may be collected in full by the judgment creditor, and satisfaction thereof may be entered by him in conformity with the provisions of sec. 4461, Rev. Codes, unless the attorney has previously given notice to the judgment debtor and taken steps for the purpose of establishing the equity of his lien and having the same lay hold upon the original judgment procured by him for the security and payment of the fees earned by him in obtaining the original judgment.

3. In the absence of notice that the attorney's fees have not been paid and that the attorney claims a lien on the judgment for that purpose, the judgment debtor is authorized and protected in paying the entire judgment to or settling it with the judgment creditor.

4. Where a judgment has been satisfied of record in conformity with the provisions of statute, sec. 4461, Rev. Codes, the attorney who procured the judgment and who has failed and neglected to take any steps for the purpose of fastening the equity of his lien upon the judgment cannot bring the parties into court by the service of a notice and motion on the attorneys who represented the respective parties in the original action and by service of a notice through the mails on his quondam client.

5. Where an attorney who has not been paid his fees for procuring a decree of foreclosure of a mortgage seeks to have the satisfaction of the judgment vacated and set aside and execution issue in his favor for the amount of his unpaid fees, on the grounds that such judgment was satisfied through fraud and collusion between the judgment debtor and judgment creditor for the purpose of defrauding him out of his fees, he is under the necessity of establishing the amount of fees still due him as against the client and of establishing the charge of fraud and collusion as against both his client and the judgment debtor, and the parties are entitled to their day in court for the purpose of joining issue and having a hearing thereon.

APPEAL from the District Court of the First Judicial District, for the County of Shoshone. Hon. R. T. Morgan, Judge.

Petition and motion by respondent, A. H. Featherstone, to have the equity of his lien for attorney's fees established as a charge against a judgment procured by him, and to have the satisfaction of that judgment vacated and set aside on the grounds of fraud and for an execution on the original

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Argument for Appellants.

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judgment. Judgment entered in favor of the petitioner, and the judgment debtor and one of the judgment creditors appeal. *Reversed.*

A. G. Kerns, for Appellants.

One cause of action cannot be grafted on to another to hold parties before a court indefinitely. (*French Trustee v. Hay*, 22 Wall. (U. S.) 245, 22 L. ed. 854.)

The owner of a judgment may receive property, securities, or any other thing of value in satisfaction of the same, if he so chooses, and when he has once accepted any substitute for money, his acceptance becomes irrevocable. (2 Black on Judgments, 987.)

Unless an attorney has an interest in or lien upon a judgment, his client may, in good faith, settle and compromise the same in any manner he chooses, without consulting the attorney, and he has no right to interfere with or prevent such settlement. (*Wagner v. Goldschmidt*, 51 Or. 63, 93 Pac. 689; *Day v. Larsen*, 30 Or. 247, 47 Pac. 101; *Stearns v. Wollenberg*, 51 Or. 88, 14 L. R. A., N. S., 1095, 92 Pac. 1079; *Wolfe v. Lewis*, 19 How. (U. S.) 280, 15 L. ed. 643; *Platt v. Jerome*, 19 How. (U. S.) 384, 15 L. ed. 623; *Wright v. Ellison*, 1 Wall. 16, 17 L. ed. 555.)

Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements. (2 Freeman on Judgments, 466.)

In Idaho as in California there is no statute giving an attorney a lien upon, and therefore an interest in, a judgment; and the attorney must consequently recover for his services in the ordinary mode. The "ordinary mode" is by an action against his client, and not against the judgment debtor. (*Ex parte Kyle*, 1 Cal. 332, and cases cited.)

Mr. Featherstone was never a party to the suit, and was not made so by intervention. He could not intervene after judgment. (1 Black on Judgments, 219; *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. 262, 2 S. E. 36.)



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Argument for Respondents.

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The only adequate and proper remedy in such case is by a separate action where all parties claiming an interest are brought before the court. (*Mayer v. Sparks*, 3 Kan. App. 602, 45 Pac. 249; *McCutcheon v. Allen*, 96 Pa. 319.)

Gray & Knight, W. K. Shissler, and Carlton Fox, for Respondents.

Attorney's fees may be awarded where the mortgage provides therefor, and when awarded, constitute a lien upon the property foreclosed. (*Stockton Sav. & L. Soc. v. Donnelly*, 60 Cal. 481; *Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555; *Warren v. Stoddard*, 6 Ida. 692, 59 Pac. 540; *Porter v. Title Guaranty & Surety Co.*, 17 Ida. 364, 106 Pac. 299; *Gray v. Denhalter*, 17 Utah, 312, 53 Pac. 976.)

The attorney is the equitable assignee of a judgment or decree, to the extent of the attorneys' fees therein allowed. (*Loofbourrow v. Hicks*, 24 Utah, 49, 66 Pac. 603, 55 L. R. A. 874; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; 3 Am. & Eng. Ency. of Law, 2d ed., 458, subd. "f.")

A court of equity will protect its attorneys in any lien or equitable interest which they may have acquired for attorneys' fees in a judgment. (*Gray v. Denhalter*, *supra*; *Stearns v. Wollenberg*, 51 Or. 88, 92 Pac. 1079, 14 L. R. A., N. S., 1095; *Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768; *Curtis v. Richards*, 4 Ida. 437, 95 Am. St. 134, 40 Pac. 57; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649, at p. 653; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Falconio v. Larson*, 31 Or. 137, 48 Pac. 703, 37 L. R. A. 254; *Curtis v. Railroad Co.*, 118 Mo. App. 341, 94 S. W. 762; *Carpenter v. Myers*, 90 Mich. 209, 51 N. W. 206; *Pötter v. Hunt*, 68 Mich. 242, 36 N. W. 58; *Phelps v. Mutual Reserve Life Fund Assn.*, 112 Fed. 453, 50 C. C. A. 339.)

The case of *Mahone v. So. Tel. Co.*, 33 Fed. 703, is very instructive on the question of when a party, dealing with property in litigation, has constructive notice of an attorney's lien thereon or equitable interest therein for fees. (See, also, *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033.)

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Opinion of the Court—Ailshie, J.

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AILSHIE, J.—A motion has been made to dismiss this appeal on the ground that it was not taken within sixty days after the order or judgment was made. The order or judgment from which the appeal has been prosecuted was made in the case of Clara Markle Dahlstrom, Plaintiff, v. Portland Mining Co., Alvan Markle and Markle Banking and Trust Co., Defendants, and some three years after the rendition and entry of the original judgment. The order involved in this appeal was made and entered on July 3, 1905, and directed that the satisfaction of the original judgment which had been made and entered be vacated and set aside, and that Albert H. Featherstone, who had been the attorney of record for the defendant and cross-plaintiff Alvan Markle in the original action, was "the equitable assignee of the Markle judgment . . . to the amount of \$5,987.24, together with the interest thereon at the rate of seven per cent per annum from the 5th day of December, 1902," the latter date being the date of the original judgment.

The order or judgment from which this appeal is taken also adjudges and decrees that Alvan Markle, defendant and cross-plaintiff in the original action, is indebted to Featherstone in the sum named, and that an execution issue in the original action in favor of Featherstone and against the defendants in the sum named, and that the property described in and covered by the original decree be sold to make the amount named. While this order or judgment, whichever it may be called, is entitled in the original action and in that sense is an order made after final judgment, still in effect and as a matter of fact it is a judgment in favor of Featherstone, who was not a party to the original action, and adjudicates his rights and demand as against both the plaintiff and defendants in the original action, and the order or judgment of the court should, therefore, be treated as a final judgment for the purposes of allowing the party aggrieved to prosecute his appeal within the statutory period of one year as provided by subd. 1 of sec. 4807, Rev. Codes.

The same order was before this court on *certiorari* in *Dahlstrom v. Portland Mining Co.*, 12 Ida. 87, 85 Pac. 916, and

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Opinion of the Court—Ailshie, J.

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the court by unanimous opinion, in speaking of the scope and effect of this order, said: "It appears from the record before us that the time has expired for an appeal from the order of July 1, 1905, but it appears that a decree of judgment was entered after said order was made. An appeal may be taken from that judgment within a year after the entry thereof."

The motion to dismiss the appeal is denied.

The judgment and decree rendered in the original case was for foreclosure of a mortgage or trust deed, and decreed a recovery by Clora Markle Dahlstrom in the sum of \$85,800.10, and a judgment in favor of Alvan Markle in the sum of \$68,620.03. These judgments were entered against the Portland Mining Co. and ordered and decreed the sale of certain mining property covered by the mortgage as security for the payment of the debts. Immediately after the satisfaction of these judgments on January 10, 1905, and on the same date, confessions of judgment were entered in favor of the respective parties for the same sums. Mr. Featherstone, who had been attorney for Alvan Markle, in procuring the original judgment filed a petition in the district court setting forth the facts of his services in the premises and that he had not been paid, alleged the amount still due him, and that the original judgment had never in truth and in fact been paid, but that the satisfaction was entered through collusion and fraud, practiced between the judgment creditor and judgment debtor, and prayed for an order vacating the satisfaction of judgment and establishing his claim and authorizing the issuance of an execution against the Portland Mining Co. for the sale of the property on which the judgment was a lien for the amount of his claim. A copy of the petition and notice of the hearing was served personally on A. G. Kerns, as attorney for the Portland Mining Co., and on W. W. Woods, as attorney for Clora Markle Dahlstrom, and by mail on Clora Markle Dahlstrom and Alvan Markle. Alvan Markle did not appear. The Portland Mining Co. and Clora Markle Dahlstrom each appeared specially and protested and objected to the jurisdiction of the court, and alleged that the court had lost jurisdiction, both over the persons of the Portland

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Mining Co. and Clara Markle Dahlstrom and likewise over the subject matter involved in the original action. The district court overruled these motions and the parties refused to appear further, and the court thereupon made findings and entered the judgment from which this appeal is taken. The appeal is prosecuted by the Portland Mining Co. and Clara Markle Dahlstrom.

Satisfaction of the original judgment in this case was entered by the judgment creditor himself in the manner prescribed by the statute, sec. 4461, Rev. Codes. Under the provisions of the foregoing section, a judgment may be satisfied by the clerk upon return of the execution satisfied, or it may be satisfied by the judgment creditor or by the attorney of record. The statute of this state does not provide for an attorney's lien on the judgment. The attorney's fee allowed in a foreclosure case is allowed to and in the name of the party in whose favor judgment is entered, and can only be allowed in such sum as the evidence shows would be a reasonable attorney's fee in such case. (*Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555; *Warren v. Stoddard*, 6 Ida. 692, 59 Pac. 540; *Porter v. Title Guaranty & S. Co.*, 17 Ida. 364, 106 Pac. 299.)

This judgment does not run in favor of the attorney, but in favor of his client, and is allowed for the purpose of compensating the client in the amount it is necessary for him to pay his attorney for prosecuting his action. The presumption of law is that the client has already either paid his attorney this sum or has become liable to the attorney for that amount. As a matter of fact, in practice the attorney generally receives a part of the amount in cash at the time or before rendering the service, and expects to wait until the judgment is collected for the balance of his fee. In the meanwhile, however, the judgment entered belongs to the judgment creditor and may be paid to him, and he may satisfy the same, he may compromise the judgment, or, if he sees fit to do so, may give it to the judgment debtor. This, however, would not release the client from the obligation to pay the attorney the balance of any fee that he may owe him for the service. The obligation and liability, however, if not other-

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Opinion of the Court—Ailshie, J.

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wise secured, is merely a personal liability of the client to the attorney. We fully recognize the justness of the rule that an attorney may take such steps against his client as to have an equitable lien decreed by the court against the judgment to the extent of the balance due him for his service in procuring the judgment. This, however, is a matter purely between the attorney and client, and the procedure is covered by the ordinary rules applying in such matters, and any order or judgment entered would attach to the original judgment and would constitute notice to the judgment debtor and all the world that the attorney is the owner of the judgment to the extent of the amount named in the order or judgment in his favor. Where he fails, however, to give notice to the judgment debtor or to take the necessary steps prior to the payment or satisfaction of the judgment in the statutory manner, he has no such standing as a party to the action as will enable him to come in by a summary proceeding and have the satisfaction of the judgment vacated and be himself substituted as a judgment creditor for a share in the original judgment. It is suggested, however, that if the satisfaction of the judgment was the result of fraud and conspiracy between the original judgment debtor and judgment creditor, the attorney who has not been paid his fee would have a right to have that judgment vacated and have the equity of his claim lay hold upon the judgment. We may concede the correctness of that position for the purposes of this case and still the attorney is confronted with the difficulty that he cannot do so by summary proceeding and service on the former attorneys of the parties or by a constructive service of notice of motion. He at once tenders an issue against both parties to the original judgment and they are entitled to their day in court to join issue and be heard on their proofs, the same as in any other original action. He is under the necessity of showing, in the first place, that his erstwhile client is still indebted to him in a specific amount. He is then under the further necessity of proving that his client and the judgment debtor have entered into a conspiracy to defraud him out of his fees, and that the judgment, although having been satis-

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Opinion of the Court—Ailshie, J.

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fied in the statutory manner, is still, as a matter of fact, due from the judgment debtor to the judgment creditor, and that the judgment debtor is not in equity entitled to have the satisfaction appear of record.

The principal case of *Gray v. Denhalter*, 17 Utah, 312, 53 Pac. 976, on which respondent relies, is not applicable to the facts of this case. The rule applied there was eminently just. The sale was not made and proceeds applied in conformity with the decree in that case, and the trial court set aside the execution sale and ordered a resale and the payment of the attorney's fees in conformity with the provisions of the original decree. The supreme court of Utah affirmed the decree.

In this state the legislature has never attempted to deal with the subject of attorney's liens. At common law an attorney had no lien on a judgment recovered by him. (4 Cyc. 1006, and note; 51 Am. St., note at 258, 259.) In the absence of statute, however, the courts, either in the exercise of their equitable jurisdiction or under the theory of their absolute power, control and authority over the judgments and processes of their own courts, have announced various and sundry rules for the protection of attorneys in the collection of their fees and in declaring equitable liens against judgments procured by the attorney. These liens have been termed "charging liens." It is wholly impossible to reconcile the decisions of the several courts on this subject, and this is perhaps due to the fact that the rule applied in these cases has no analogy in any other branch of the practice or in any other class of litigation, and is one that has simply grown out of the equities of the case and has been adopted by the courts for the protection of their officers. As said by Mr. Freeman in his note to *Hanna v. Island Coal Co.*, 51 Am. St. 257: "Little is known of its origin, but the principle has long been recognized that a 'party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expense, those fruits are obtained.'" The above-mentioned note in 51 Am. St. Reports is very exhaustive, and collects the authorities and gives a large number of instances in which the courts

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have intervened for the protection of the attorney, and have declared a lien on the judgment obtained by him. An examination of this note is worth the while of anyone who is looking for authorities on the subject. (See, also, 4 Cyc., pp. 1005 to 1009.) It will be found that the courts are quite uniform in allowing an attorney an equitable lien on a judgment procured by him as security for his fees earned in that case. The matter of procedure, however, in the enforcement of such a lien is not uniformly established. Where the contest is solely between the attorney and his client, some of the courts have determined the matter in a summary manner on motion of the attorney, while others have required him to establish his claim in an action at law in the regular manner, and have laid hold upon the original judgment in favor of his client as a thing *in rem*, in somewhat the same method pursued to establish a vendor's lien or remove a cloud from title, and thereby fastened the equity of his lien upon the judgment and authorized the execution to issue out of the original case. As we view the matter, it is of very little consequence, where the sole controversy arises between the attorney and his client over the attorney's equity in an existing judgment, whether the client be brought in by petition in the original action or by an independent action, provided the client is served and is given his day in court. The result in either event must be the same if the attorney is successful in establishing his claim.

A very different question arises, however, where the original judgment has been satisfied and the case is no longer pending and the parties are no longer in court. The statute has specifically and positively authorized the client to enter satisfaction of a judgment in his favor. When he does so, that ends the case and dismisses the parties from the jurisdiction of the court. We have no doubt of the right of an attorney who has been defrauded by this process to prosecute his action against the parties for relief from such a fraudulent transaction and to have the judgment reinstated. When he does so, however, it is necessary, as we have above said, for him to bring the parties into court, and he cannot do so by service

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Opinion of the Court—Stewart, J., Concurring.

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on the attorneys who represented them in the original litigation. As the record appears in this case, it would seem that respondent's remedy is as available against the judgment that was entered by confession as it was against the original judgment, if in fact he can show that it is simply a renewal of the original obligation which he prosecuted to final judgment in the first instance. We conclude that the judgment in this case was entered without jurisdiction, and must be *reversed*. Costs awarded to *appellant*.

STEWART, J., Concurring.—I concur in the conclusion of Justice Ailshie that the judgment in this case must be reversed. When the judgment foreclosing the Alvan Markle mortgage was rendered and the same specified the amount allowed therein as an attorney's fee, such allowance was for the benefit of Markle's attorney, and to be paid to him as his compensation in that particular case and no part of which was to be retained by Markle. (*Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555; *Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540; *Porter v. Title Guaranty & Surety Co.*, 17 Ida. 364, 106 Pac. 299.)

This necessarily made Featherstone interested in such judgment although he does not appear as the judgment creditor. The allowance, however, of the attorney's fee was for his benefit, and until he has been paid that fee either out of the judgment or independent of the judgment, he has an equitable interest in such judgment to the extent of the fee allowed. This fact alone, however, does not create a lien against such judgment in favor of the attorney, but is the proof upon which he may apply to the court to declare his lien. Until the judgment is fully executed the court retains jurisdiction of the subject matter and the parties for the purpose of hearing any motion affecting such judgment, and if the attorney desires to have his lien established and declared against such judgment, he may apply to the court for that purpose and serve the parties to said action with notice of the hearing of such motion and make the statutory service as in other motions.



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Opinion of the Court—Stewart, J., Concurring.

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Where, however, the judgment is satisfied, as in this case, and I do not mean by this paid, but a satisfaction entered of record, then upon such satisfaction having been entered, the court lost jurisdiction both over the judgment and the parties, and to empower the court to set aside such satisfaction upon the ground of fraud, a direct proceeding must be brought for that purpose and service made as in other original actions and proof tendered sufficient to establish the allegation of fraud. The court had no power upon motion by a stranger to the judgment to set aside the satisfaction of the judgment on the ground of fraud.

In this case before Featherstone's lien could be declared against the judgment it was necessary to annul the satisfaction and reinstate the judgment, and I do not believe that the court had any jurisdiction to set aside the satisfaction of judgment on the ground of fraud and reinstate such judgment, after a satisfaction of such judgment had been entered of record, without service upon the parties to such judgment as in an original proceeding.

It will not do to say that because the judgment confessed was for the same sum as the original judgment and referred to the original judgment as containing the facts upon which such confessed judgment was entered, that therefore the jurisdiction exercised by the court in entering such confessed judgment was a continuation of the jurisdiction acquired in the original action. Before the court had jurisdiction to enter the confessed judgment it was necessary that jurisdiction be acquired by service in accordance with the statute or by voluntary appearance of the parties. The court did not have jurisdiction to enter a judgment by confessing in lieu of an original judgment simply because the court had jurisdiction of the parties in the original action. It was necessary that new jurisdiction be acquired. Neither is it sufficient to say that the court had jurisdiction to set aside the satisfaction of the original judgment because the court acquired jurisdiction of the parties to enter a confessed judgment, after the original judgment was satisfied. To make valid the actions of the court, it must have jurisdiction to do the thing done at the

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Opinion of the Court—Sullivan, C. J., Dissenting.

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time the act is done; and while the service of the motion to have a lien adjudged against said judgment in favor of Featherstone would have been sufficient if made in accordance with the provisions of the statute, and such application had been made prior to the satisfaction of such judgment, still such service is not sufficient after the judgment has been satisfied, because the declaration of the lien also involves the annulling of the satisfaction of the judgment.

It will be observed that the motion to establish and allow the lien is not addressed to the confessed judgment, but is addressed to the original judgment, and before a lien can be declared against the original judgment, it was necessary to set aside the satisfaction of the same. If Featherstone was entitled to a lien against the original judgment, and a satisfaction of such judgment was entered without payment by confessing a new judgment which included the amount allowed in the original action as attorney's fees, there would seem to be no reason why Featherstone could not bring an action for the purpose of establishing such lien against the confessed judgment, or if the satisfaction of the original judgment was the result of fraud and made for the purpose of defeating Featherstone's lien, then there would seem no reason why an action might not be brought to set aside such satisfaction and establish such lien. But in such case service must be made as in other original actions.

For these reasons I concur in the conclusion of Justice Ailshie that the judgment must be *reversed*.

SULLIVAN, C. J., Dissenting.—I am unable to concur in the conclusion reached in this case by my associates. The decision is largely based upon the theory that the judgment entered on December 5, 1902, had been fully satisfied by the judgment debtors. The record does not bear out that conclusion. While it was satisfied of record, the consideration for such satisfaction was the confession of identically the same judgment and a renewal of the lien of the indebtedness in favor of the judgment creditors. It was not a payment of it. The satisfaction of judgment is as follows:

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Opinion of the Court—Sullivan, C. J., Dissenting.

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“For and in consideration of a confession of judgment and renewal of the lien of the indebtedness by the Portland Mining Company in favor of Clora Markle Dahlstrom for the sum of \$85,800.10, with interest at 7 per cent annum from December 5, 1902; and in favor of Alvan Markle for the sum of \$68,620.03, with interest at 7 per cent per annum from December 5, 1902, the plaintiffs in the above-entitled action hereby acknowledge full satisfaction of that certain judgment and decree of foreclosure made and rendered in the above-entitled action on December 5, 1902, in favor of said plaintiffs and against the said defendants; and the clerk of the above-named court is hereby authorized, empowered and directed to make and enter the full satisfaction of said judgment and decree of foreclosure.

“Signed, sealed and delivered this January tenth, 1905.

“CLORA MARKLE DAHLSTROM,

“By GEO. B. MARKLE,

“Her Attorney in Fact.”

The confession of judgment is as follows:

“The Portland Mining Company, a corporation organized and existing under the laws of the State of Oregon, owning real and personal property in Shoshone county, State of Idaho, by D. F. Sherman, its secretary and duly authorized agent, does hereby confess judgment in the above-entitled action in favor of Alvan Markle, plaintiff in said cause, for the sum of sixty-eight thousand six hundred twenty and 03-100 dollars (\$68,620.03), to bear interest at the rate of 7 per cent per annum from December 5, 1902; and does hereby authorize and direct the clerk of the above-named court to enter of record judgment for said sum.

“This confession of judgment is for a debt justly due and owing to Alvan Markle, the plaintiff, from the Portland Mining Company, defendant, on a judgment of the above-named court made and rendered December 5, 1902, wherein Clora Markle Dahlstrom and Alvan Markle, plaintiffs and the Portland Mining Company and the Markle Banking & Trust Company, of Hazelton, Pennsylvania, were defendants, for the

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Opinion of the Court—Sullivan, C. J., Dissenting.

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sum of \$39,476.26, principal, \$22,896.23, interest, \$6,237.24, attorney fees and \$10.30, costs in said action.

"This confession of judgment is made in consideration of the said Alvan Markle entering of record the satisfaction of said judgment and decree of foreclosure rendered December 5, 1902, and is a renewal of said indebtedness evidenced by said judgment and decree of foreclosure.

"This confession of judgment is made, executed, acknowledged and delivered under and in pursuance of a resolution of the board of directors of the said Portland Mining Company, duly adopted at a special meeting thereof duly assembled in the City of Portland, State of Oregon, on December 27, 1904, which action of the board of directors was on the same day unanimously approved by a vote of all the stockholders of said corporation, composing a majority of the stockholders in attendance at a meeting of the stockholders of said corporation duly called and assembled in the City of Portland, State of Oregon, on December 27, 1904, and the power thereby conferred upon the undersigned, D. F. Sherman, secretary of said corporation.

"Signed, sealed and delivered January tenth, 1905."

"PORTLAND MINING COMPANY,

(Seal)

"By D. F. SHERMAN,

"Secretary."

The original decree of foreclosure recites that Alvan Markle shall have and recover, etc., \$39,476.26 principal, \$22,896.23 interest, and \$6,237.24 attorney's fees. Those items are identically the same as are contained in the confession of judgment, and the \$6,237.24 attorney's fee there referred to is the attorney's fee allowed by the court to Alvan Markle in the original judgment. They are, in fact, one and the same judgment. While the judgment of confession bears a different date from that rendered by the court, it involves identically the same items of indebtedness, no part of which has been paid by the judgment debtors, and gives the court jurisdiction of the same parties. All of the parties appeared and submitted themselves to the jurisdiction of the court for the

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Opinion of the Court—Sullivan, C. J., Dissenting.

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purpose of having said judgment by confession entered, and the court has the same jurisdiction over them that it would have had if the defendants had been brought in by summons.

I do not think it is right to say that the judgment of December 5, 1902, has been paid. It has simply been satisfied by a re-entry of a judgment involving the same facts determined by the first judgment; it has not been paid. To my mind the case stands just the same, so far as the parties, the facts and the attorneys are concerned, as it would stand had not the original judgment been renewed by the confessed judgment. I do not think that the relation of the parties or of the attorneys has been changed in the least by the entry of the judgment by confession, and there is where I think my associates err in holding that this case stands just the same as it would had the judgment debtor in fact paid the judgment. Had the judgment been actually paid, then a very different question would be presented.

I do not think a client should be permitted to swindle his attorney out of compensation for his labor in procuring his judgment by confessing the same judgment, thus running away with the fruits of it. If his client has entered into an arrangement with the judgment debtors whereby he may swindle and cheat his attorney, I do not think the court ought to be very technical in protecting the rights of such a client; and especially where the rights of the judgment debtors are in no manner affected.

In the trial of the original case Alvan Markle produced witnesses to establish the reasonable value of Featherstone's services in procuring said judgment, and the court awarded him \$6,237.24. The record shows that he has paid the attorney only \$250 of that fee. And now shall this court permit his client to defraud him simply by confessing identically the same judgment and thus satisfy the judgment in which such fee was allowed? I do not think it should.

But it is held that the service of the Featherstone motion on the judgment debtors and the client of Featherstone is not sufficient to bring them into court. Notice was served on the attorneys for the judgment debtor. They appeared specially

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Opinion of the Court—Sullivan, C. J., Dissenting.

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in the proceedings. Notice was served of the pendency of the application of Featherstone by service of a copy of the notice and the application on the clerk of the court, and also by sending by registered mail to Alvan Markle at Hazelton, Pennsylvania, his postoffice address, a copy of said notice and petition, which he received as shown by the registry return receipt contained in the record. The plaintiffs and defendants both appeared and submitted themselves to the jurisdiction of the court at the time the first judgment was rendered. They also appeared and submitted themselves to the jurisdiction of the court at the time judgment by confession was rendered, and we are in accord with the statement of Justice Ailshie's opinion to the effect that when satisfaction of judgment is entered, "that ends the case and dismisses the parties from the jurisdiction of the court"; but until the judgment is satisfied, the court still has jurisdiction of the case and of the parties to it for any and all proceedings that may be legally taken therein.

Sec. 4893 of the Rev. Codes provides that when a plaintiff or defendant who has appeared in an action resides out of the state and has no attorney resident of the state in the action or proceeding, the service of papers in such action may be made on the clerk of the court. In both of the above judgments referred to, the parties appeared and gave the court jurisdiction, and under the provisions of said section, notice of any proceedings in such action, after the parties have appeared, must be made upon the clerk, provided the party on whom such service is desired to be made resides outside of the state. Service of the notice of the Featherstone motion was so made upon Alvan Markle. That service, I think, was sufficient, but Featherstone did not stop there. He served on Markle the notice of his motion with a copy of his application, by mail, under the provisions of sec. 4891, Rev. Codes, and the record shows by the return of the registry receipt that Markle received said notice and application. That service was amply sufficient under the statute to give the court jurisdiction to hear said motion and determine the matter.

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Opinion of the Court—Sullivan, C. J., Dissenting.

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In *Phelps v. Mutual Reserve L. F. Assn.*, 112 Fed. 453, 50 C. C. A. 339, the court had under consideration a question similar to that under consideration here. The question arose in that case as to whether the court was powerless because the judgment debtor was a foreign corporation, unrepresented by agents in the state. Judge Lurton in preparing the opinion of the court asks this question, and says: "Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents and having no property subject to execution? As we are advised by an opinion subsequently filed by the very learned judge of the state court, that court regarded a summons upon this supplemental proceeding as wholly unnecessary, because no new cause of action was presented therein, and because the judgment debtor was charged with constructive notice of all steps taken in the case after the original service in the primary action. Aside from any question of the sufficiency of constructive notice where, in the same case, a receiver is applied for, after judgment and return of *nulla bona*, as a substitute for an alias execution, or an attachment, or other proper writ of process, we are not prepared to say that, if such a supplemental matter be regarded as a new suit or action, the constitutional requirement of due process is infringed if a receiver be appointed before notice. Doubtless the general rule is that, even after judgment, applications for appointment of a receiver should not be entertained without notice. (Beach, Eq. Prac., sec. 730, and cases cited.) 'But,' says the author, 'the rule requiring notice is not so inflexible as to prevent the court from proceeding in cases where it is impracticable to give legal notice, as in the case of absconding or nonresident defendants, or in case of great emergency demanding the immediate interference of the court.'

"The ground upon which the court below proceeded was that there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceedings. To quote the figurative, yet forcible, language of Judge Evans, 'the whole so-called supplemental proceeding was an attempt to graft a living branch upon a dead stalk.' For this reason,

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Opinion of the Court—Sullivan, C. J., Dissenting.

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said the judge, 'the filing of the supplemental petition and the action of the court appointing a receiver thereupon will be treated as nullities.' The metaphor, as we have already seen, is not apt. The jurisdiction of the state court had not been exhausted by the rendition of its judgment; for, under well-settled rules of general jurisprudence, it continued for the purpose of enforcing satisfaction of that judgment."

We think the suggestions there are applicable to this case, and a rule requiring service of notice is not so inflexible as to prevent the court from proceeding at all unless personal service is made, and we think there is sufficient vitality remaining in an action that has gone to judgment to justify supplemental proceedings for its collection and to protect the attorney in the collection of his fee, and such vitality continues until the judgment has been fully paid and satisfied,—not merely renewed.

Alvan Markle is a nonresident of the state. The jurisdiction of said court was not exhausted by the rendition of its judgment, for under well-settled rules of general jurisprudence it continues for the purpose of enforcing satisfaction of that judgment. This matter in no way affects the defendants. They have not paid the judgment, and in law it matters not to them whether they pay a part of it to the attorney for Markle or not. This is a proceeding after judgment. The judgment was rendered December 5, 1902, and the plaintiff, a nonresident, has not proceeded to collect said judgment, although nearly eight years have expired since the judgment was entered, and has absolutely refused to pay his attorney the fee which was allowed him by the court. We have no statute prescribing the procedure in such a case as the one at bar, but we think the procedure adopted in this case is proper, equitable and fair to all of the parties interested. I do not think it necessary for the attorney to bring an action at law in the regular manner and attach the judgment and thus fasten a lien upon it.

Mr. Justice Ailshie states as follows: "In the absence of a statute, however, the courts, either in the exercise of their equitable jurisdiction or under the theory of their absolute



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Opinion of the Court—Sullivan, C. J., Dissenting.

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power, control and authority over the judgments and processes of their own courts, have announced various and sundry rules for the protection of attorneys in the collection of their fees and in declaring equitable liens against judgments procured by the attorney." I concur fully in that statement. I think that the court in this case ought to exercise its equitable jurisdiction and so far control this judgment as to compel the judgment creditor, Alvan Markle, to pay to his attorney the amount awarded by the court as an attorney's fee. This court has held that the client is not entitled to recover any larger attorney's fee than he pays his attorney, and the presumption in this case is that the amount allowed by the court was the reasonable value of the attorney's services and no more. (*Jones v. Stoddart*, 8 Ida. 210, 67 Pac. 650; *Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555.)

Mr. Justice Ailshie quotes from a note by Mr. Freeman to *Hanna v. Island Coal Co.*, 51 Am. St. 257, as follows: "Little is known of its origin, but the principle has long been recognized 'that a party should not run away with the fruits of the cause without satisfying the legal demands of his attorney by whose industry and, in many instances, at whose expense, those fruits are obtained.'" Apparently Mr. Justice Ailshie is in accord with the sentiment there expressed, but proceeds at once to let Markle run away with the fruits of this litigation, on the ground that the court did not have jurisdiction under the service of notice as made, to which I am not inclined to assent.

The sole controversy here arises between the attorney and his client as to the attorney's equity in the existing judgment, and the client has been brought in in this proceeding by proper service of the notice of this application and was given opportunity to appear and thus have his day in court. But after proper notice was served upon him of this proceeding, he declined to appear and is in default and has thus confessed the justness of Featherstone's application. Mr. Justice Ailshie states as follows: "A very different question arises, however, where the original judgment has been satisfied and the case is no longer pending and the parties are no

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Opinion of the Court—Sullivan, C. J., Dissenting.

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longer in court." As I view it, the judgment has not been satisfied; at most it has only been renewed by all parties thereto appearing in court. The judgment by confession is in substance and effect the original judgment and has in no manner been paid. In one sense, the parties are in court until the judgment is paid and satisfied; that is, the court has jurisdiction until the judgment has been paid. Mr. Justice Ailshie says: "The statute has specifically and positively authorized the client to enter satisfaction of a judgment in his favor." I admit that, but this judgment, in my view of the matter, has not been satisfied; it has simply been renewed. Justice Ailshie also says: "When he [the judgment creditor] does so, [satisfies the judgment] that ends the case and dismisses the parties from the jurisdiction of the court." He thereby admits that the court has jurisdiction of the judgment and the parties until the judgment is satisfied. If we carry out the idea of Justice Ailshie to its legitimate result in the judgment by confession, the court has jurisdiction of no parties at all. It is a well-settled rule where both parties appear and consent to a confession of judgment, the court has jurisdiction of the parties. The court had jurisdiction before the renewal was entered, and now will it be contended that the renewal judgment by confession has deprived the court of jurisdiction of the parties to it? The court has jurisdiction of the parties to a judgment by confession.

As before stated, the judgment debtors in this case are not interested in this matter in any way, as they have not paid the judgment, and this proceeding is in fact confined to Alvan Markle and one of the judgment creditors and his attorney. In my view of the matter, it was not necessary for the trial court to set aside the satisfaction of judgment and the judgment by confession and restore the original judgment, as the parties are the same, the rights are the same, the attorney's fees the same and the subject of litigation the same as they were in the original judgment. I do not think that the court has lost jurisdiction of the parties or of the subject matter simply because the original judgment was superseded or renewed with a judgment by confession which involved the same

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Argument for Appellant.

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parties, the same issues, the same subject of litigation—everything the same. Since the court found in this proceeding that the judgment by confession was brought about by collusion and fraud, I think the action of the trial court ought to be sustained. There is no statute requiring such notice to be served as a summons, and no such requirement should be made by this court.

Petition for rehearing denied.

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(May, 6, 1910.)

NICK MILLER, Respondent, v. JOHN BROWN, Appellant.

[109 Pac. 139.]

APPLICATION FOR CONTINUANCE—ADDRESSED TO SOUND DISCRETION OF COURT.

(Syllabus by the court.)

1. An application for a continuance is addressed to the sound legal discretion of the court, and the decision of the court or judge thereof will not be reversed unless there is a clear abuse of discretion.

2. *Held*, under the facts of this case that the motion for a continuance was properly denied.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Wm. W. Woods, Judge.

Action to recover balance due upon the sale of certain mining claims. Judgment for plaintiff. *Affirmed*.

Gray & Knight, and William K. Shissler, for Appellant.

Where parties have been diligent in their efforts to be ready for trial, but have been prevented by circumstances beyond their control, the court should grant them a continuance. (*Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.)

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Argument for Respondent.

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While a motion for a continuance is addressed to the sound discretion of the court, there is a point where it ceases to be a question of discretion or abuse of discretion, and a party acquires a right to a continuance as a matter of law. (1 Spelling, New Trial, sec. 126.)

It is a judicial discretion not to be capriciously or oppressively exercised. (*Mitchell v. Campbell*, 14 Or. 454, 13 Pac. 190; *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.)

It is the right of parties to be present at the trial of their cases. It seldom happens that a trial can be properly had in the absence of a party, even where he is disqualified as a witness, especially where it is to be tried on oral testimony. (Spelling, New Trial, sec. 128; *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636; *Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55; 9 Cyc. 93; *Mayton v. Guild* (Tex. Civ. App.), 29 S. W. 218; *Helm v. Voils*, 58 Kan. 816, 49 Pac. 662; *Donallen v. Lennox*, 6 Dana (Ky.), 89.)

Where the defendant is necessarily, although temporarily, out of the state and the continuance asked for is but a short time, it should be granted, provided the defendants have been guilty of no unreasonable delay or negligence. (*Robertson v. Woolley*, 6 Wash. 156, 32 Pac. 1060.)

Where, as in the case at bar, the attorney's absence is due to the fact that he is actively engaged in the trial of a case in another jurisdiction, having had no notice whatever of the time fixed for the trial of the case, the continuance should be allowed. (*Olden v. Litzenburg*, 1 Phila. (Pa.) 204.)

Featherstone & Fox, for Respondent.

The absence of the defendant at the time his case is called for trial is not sufficient ground for a continuance. (*Queirolo v. Queirolo*, 129 Cal. 686, 62 Pac. 315; *Paulucci v. Verity*, 1 Kan. App. 121, 40 Pac. 927; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027; *Cohn v. Brownstone*, 93 Cal. 363, 28 Pac. 953; *West v. Hennessey*, 63 Minn. 378, 65 N. W. 639; *Richardson v. Dinkgrave*, 26 La. Ann. 651; *Schlessinger v. Nunan*, 26 Ill. App. 525; *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636.)

## Opinion of the Court—Sullivan, C. J.

In most cases a continuance on the ground of absence of counsel will be refused. (*Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53; *Keegan v. Donnelly*, 11 Colo. App. 31, 52 Pac. 292; *Reynolds v. Campling*, 23 Colo. 105, 46 Pac. 639; *Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335; *Hayne*, New Trial and Appeal, secs. 76, 77.)

“Due diligence is a question upon which the decision of the trial court is always presumably correct.” (4 Ency. Pl. & Pr. 856; *Blair v. Chicago etc. R. Co.*, 89 Mo. 384, 1 S. W. 350; *State v. Whitton*, 68 Mo. 91; *Boone v. Mitchell*, 33 Iowa, 45.)

SULLIVAN, C. J.—This action was brought to recover a balance of \$11,495 with interest thereon, alleged to be due upon the sale of certain mining claims, to the defendant John Brown. An application for a continuance was made by the appellant, John Brown, and overruled by the court. Thereafter the cause was tried by the court without a jury and a judgment was entered in favor of the plaintiff for the sum of \$13,089.50, together with costs, which judgment was made a lien upon certain mining claims and also directed the foreclosure of said lien and the sale of said mining claims to satisfy said judgment. Thereafter a motion was made by said appellant to set aside the findings of fact and judgment, for the reason that the trial of said action was had in the absence of the defendant, and for the further reason that said defendant had no notice prior to the trial of said action of the setting of said case for trial, and that the defendant had no opportunity to secure the attendance of his witnesses. This motion was denied and the appeal is from the judgment and from the order denying the motion to set aside the findings and judgment.

The question presented by the appellant in his brief is whether the court erred in denying his application for a continuance. Said motion for a continuance was based on the affidavit of Henry P. Knight, one of the attorneys for the appellant.

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Opinion of the Court—Sullivan, C. J.

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It appears from the record that on June 23, 1909, the trial court set this case for trial on the following day, the 24th of June, which was the 92d judicial day of the regular January, 1909, term of that court. The motion for a continuance came on for hearing on that day and, as stated, was denied by the court. The question presented is, whether the court abused its discretion in denying said motion for a continuance.

The facts presented to the court for a continuance are found in Mr. Knight's affidavit. It appears from that affidavit that the affiant is a member of the firm of Gray & Knight and was not informed that his firm was interested in said action until the 23d day of June, 1909; that Mr. Barnes, residing at Spokane, Washington, was the principal attorney for the defendant in said action and had had charge of all of the pleadings in said case in preparing the same for trial; that all correspondence in connection with said case had been conducted by said Barnes with affiant's law partner, Mr. Gray, who had for more than ten days prior to the date said case was set for trial been in the eastern states on business, and that said Gray had not informed affiant of their firm's connection with said action; that when he was informed thereof, he immediately called up Mr. Barnes at Spokane by telephone and had a conversation with him in regard to the case. In that conversation Mr. Barnes stated that he had no notice of the fact that the said action would be called for trial until the afternoon of that day, the 23d of June, when he received a telegram from Mr. Hand, one of the attorneys for the plaintiff, to that effect. Said Barnes informed the affiant that his client, John Brown, was then in Winnipeg, Canada, and his presence could not at that time be procured; that defendant had gone to Winnipeg without knowledge of the fact that said case would be for trial at that term of court. It is further stated by affiant that if the trial could be continued until some time after the 10th of July, 1909, said appellant could be present and said action tried; that said Barnes further stated to affiant that no other witness could be immediately procured by whom the defendant could prove

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Opinion of the Court—Sullivan, C. J.

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the facts necessary to maintain his action, and that there were no other witnesses except said Brown who knew the facts and all of the facts necessary to maintain said defendant's contention; that if said action was forced to trial at that time, it would be impossible for the defendant properly, or in any manner, to present his case and would therefore necessarily result in great injustice to him.

The application for a continuance was heard upon the records and files and said affidavit. This court has held in numerous decisions that an application for a continuance is addressed to the sound legal discretion of the court, and its ruling will not be reversed unless it appears that such discretion has been abused. (See *Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55, where all of those decisions are collated.)

Then, did the court abuse its discretion in granting said continuance?

It appears that the day on which the case was set for trial, to wit, the 23d of June, was the ninety-first judicial day of the regular January, 1909, term of said court, and that the case was set for hearing on the following day, June 24th. It also appears from said affidavit that Mr. Barnes, the principal attorney for Brown, resided at Spokane and was notified on the 23d that said case was set for hearing on the 24th of June; that Mr. Knight did not know that his firm were attorneys for Brown until after Barnes had so advised him by telephone on the 23d. At that time Mr. Barnes notified Mr. Knight that his client, Brown, was then in Winnipeg, Canada, and that his attendance could not be procured, and that said Brown had gone to Winnipeg without the knowledge of the fact that this case would be for trial at the present term. It appears that the case was on the calendar for said term of court, and evidently the trial court concluded that it was Mr. Brown's duty to be present when the case was reached for trial at that term, upon the facts presented to him.

It appears from another affidavit in the case, which, however, the court did not have before it at the time of refusing the continuance, that Mr. Brown inquired of his attorney Barnes when said cause would be tried, and the attorney

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Opinion of the Court—Sullivan, C. J.

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informed him that he had received no notice that said case had been set for trial, and that it would be safe for him to go to Alberta, Canada, on a business deal, and testified: "Upon my statement of such fact, he left for Alberta about the 15th" (of June, 1909). It thus appears from the record how Brown came to leave for Winnipeg on his own private business.

There appears to be considerable stress laid upon the fact that the attorney for appellant had no notice of the setting of the case for trial until one day prior to the trial. Under our statute and rules of that court, so far as we know, there is no requirement that notice of the setting of cases shall be served upon counsel for the respective parties, and the attorney ought to have known the condition of the calendar at the time he advised his client to go to Canada, and as it does not appear that it was the duty of anyone to notify the attorney for Brown when the case was set for trial, it was his own duty to ascertain that fact and have his client within reach when the case was in fact set for trial. So the fact that he was not notified that the case was set for hearing should have no weight whatever in this matter. Trial courts ought to so set cases that litigants may have an opportunity to procure their witnesses for the trial, and not require them to keep their witnesses in attendance longer than is necessary in the orderly conduct of the court business.

Mr. Knight's affidavit is based almost wholly upon what Mr. Barnes told him over the phone, and the court may have concluded that the affidavit was not sufficient for that reason. It clearly appears that there has been negligence and carelessness in this matter. Mr. Knight did not know that his firm were the local attorneys for Brown, and Mr. Barnes, who lived in Spokane and had a large practice there, evidently depended upon the local attorney to look after that matter. The local attorney who knew anything about the matter had gone east without informing Mr. Knight that they were the local attorneys. From the facts set up in Mr. Knight's affidavit, we are unable to say that the court abused its discretion in denying said application for a continuance. When we come to consider all of the facts presented, we think that the trial



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Opinion of the Court—Ailshie, J., on Petition for Rehearing.

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court was fully justified in denying the application for a continuance.

Having concluded that the court did not err in refusing to grant said continuance, it is not necessary for us to pass upon the question as to whether the court should have set aside the findings and judgment upon the application of Brown, for if the continuance was properly denied, the application to set aside the findings and judgment was also properly denied, as that application is based on the ground that the court erred in not granting a continuance. And, further, the assignment of error on the ground that the court erred in not granting the application to set aside the findings and judgment is not presented in the brief of appellant.

The judgment must be affirmed, and it is so ordered, with costs in favor of respondent.

Stewart and Ailshie, JJ., concur.

ON PETITION FOR REHEARING.

(June 6, 1910.)

AILSHIE, J.—The appellant has filed a petition for a rehearing and urges that the opinion in this case runs counter to the holding of the court in *Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55.

As we understand the facts of the two cases, there is quite a marked distinction between them. In the *Storer-Heitfeld* case, Dubois, one of the defendants, was called from the state on the eve of the trial to Springfield, Illinois, on account of the death of his brother. While he voluntarily absented himself, still the cause was one beyond his control, and the sentiments of humanity would naturally impel one to act as he acted, and courts themselves being human institutions must of necessity take cognizance of such unforeseen occurrences and the sentiments which they call forth.

In the case at bar, the defendant voluntarily absented himself from the state on business, and he did so after the court had been in session nearly three months and while his case

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Points Decided.

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was pending, and knowing, as he must have known, that his case was liable to be called at any time. While he went away with the consent and acquiescence of his counsel, that fact in no way relieves him from the charge that he was careless and negligent in the matter of preparation for the trial in this case. We see no reason for granting a rehearing. The petition is denied.

Sullivan, C. J., concurs.

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(May 10, 1910.)

ROBERT TIPTON et al., Respondents, v. EPHRIAM G. ELLSWORTH et al., Appellants.

[109 Pac. 134.]

~~FORECLOSURE OF MORTGAGE—FRAUD—WAIVER OF—USURY—ATTORNEY'S  
FEE—BADGE OF FRAUD—BANK EXCHANGE—COVER FOR USURY—  
NOTE AND MORTGAGE—CONFLICT BETWEEN—DEFAULT IN PAYMENT  
—PENALTY FOR—PAYMENT OF INTEREST—STIPULATION FOR—  
SEPARATE PROPERTY OF WIFE—CONTRACTS OF WIFE.~~

(Syllabus by the court.)

1. *Held*, that there was no fraud, deception or failure of consideration in the contract for the sale of the land involved in this case.

2. Where an original contract has been made for the purchase of land and under that contract the purchasers take possession of the land and have full opportunity to ascertain all of the facts in regard to the water rights and roads connected therewith, and thereafter procure the seller to waive the contract and to deliver them a deed for the premises, and execute a mortgage for the purchase price upon different terms from that provided by the original contract, they thereby waive any question of fraud in the original contract.

3. Under the provisions of subd. 5 of sec. 3459, Rev. Codes, an attorney's fee may be legally stipulated for in case payment shall not be made at maturity, and such stipulation is not a usurious contract.

4. A stipulation to pay bank exchange on borrowed money is not usurious unless it appears that such stipulation is a device to

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Argument for Appellants.

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cover a usurious contract and it was not intended that the money should be remitted to the place to which exchange is provided.

5. Where the provisions of a promissory note, secured by mortgage, vary from the terms of the mortgage, the provisions of the note must control.

6. Where it is stipulated in a promissory note that "the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of the note" if payment of interest and principal instalments are not made when due, such stipulation is a penalty, and will not be enforced as to the interest not yet earned on the principal.

7. *Held*, that Mrs. Ellsworth is one of the principals upon the promissory notes involved in this case and not a surety.

8. Under the laws of this state, a married woman may bind her separate property jointly by her contract for her own or her husband's debt.

APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action to foreclose real estate mortgage. Judgment for plaintiff. *Affirmed*.

Ben. F. Tweedy, E. J. Doyle, and G. Orr McMinimy, for Appellants.

The decree is erroneous because it destroys the equity of redemption, not only of Ephriam G. Ellsworth, but also of Mrs. Ellsworth. A separate sale of the property should have been decreed because, under our statute, such sales are made subject to the right of the owner to redeem. (*Raun v. Reynolds*, 11 Cal. 14-21.)

"The decree should have provided for a sale of the property embraced in each mortgage to satisfy the particular debt, and no other." (*Strode v. Miller*, 7 Ida. 16, 59 Pac. 893.)

"A wife who has mortgaged her separate property for her husband's debt is in the position of a surety. When he has mortgaged or pledged his own property for the same debt, his property should in the first instance be applied to satisfy the mortgage." (1 Jones on Mortgages, 4th ed., p. 93, sec. 114, and cases cited.)

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Argument for Respondents.

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In consideration of the question of usury, "the subject of inquiry in such cases is whether or not a contract has been made whereby, either directly or indirectly, a greater rate may be charged than that authorized by law." (*Ford v. Wash. Nat. B. & L. Assn.*, 10 Ida. 30, 109 Am. St. 192, 76 Pac. 1010.)

The notes upon their face show no necessity of transmitting the money paid to any other place within or out of the state, and the promise to pay exchange on New York is a mere device to collect interest, and is not an agreement to pay actual expenses of exchange on New York, there appearing upon the face of the note no necessity for the shipment of the money to New York or elsewhere to make payment of the notes. (*Siter v. Sheets*, 7 Ind. 132; *Wood v. Cuthberton*, 3 Dak. 328, 21 N. W. 3; *Towslee v. Durkee*, 12 Wis. 480; *Stevens v. Lincoln*, 7 Met. (Mass.) 526; *Rock County v. Wooliscroft*, 16 Wis. 22; *Pacill v. Woods*, 2 Ohio Dec. 381; *Lutterick v. Harris*, 1 Biss. 442, 2 Fed. Cas. No. 2256.)

"Usury cannot be sanctioned under any name or guise, and where usury is contracted for, directly or indirectly, party making the loan cannot, under our statutes, recover any interest or cost." (*Stevens v. Home Savings & Loan Assn.*, 5 Ida. 741, 51 Pac. 781, 986; *Vermont Loan & Trust Co. v. Hoffman*, 5 Ida. 376, 95 Am. St. 196, 49 Pac. 315, 37 L. R. A. 509; *Cleveland v. W. L. & S. Co.*, 7 Ida. 477, 63 Pac. 885.)

The provision of the second Guernsey mortgage for the payment of attorney's fees is simply another device to collect interest, for there can be no such expense for collection of interest, separate and apart from the collection of the principal; there can be only one attorney fee contracted for legally; therefore, it must be a device to get interest upon interest in the guise of attorney's fees. (*Towslee v. Durkee*, 12 Wis. 544.)

Eugene A. Cox, and E. O'Neill, for Respondents.

No warranty of title was made by the plaintiff. In the ordinary contract of purchase and sale there is an implication

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Argument for Respondents.

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that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement upon the subject, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor. (*Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. 123, 27 Pac. 280; *Goodell v. Sanford*, 31 Mont. 163, 77 Pac. 522; *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300.)

In the absence of fraud, the acceptance of a deed merges all of the prior transactions and agreements of the parties into the deed itself, and thereafter the vendee must rely solely on the covenants in the deed. (*Hampe v. Higgins*, 74 Kan. 296, 85 Pac. 1019; *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180; *Robison v. Robison*, 44 Ala. 227.)

If an independent examination is made, the vendee cannot claim that he relied upon the vendor's representations, and no rescission will be granted on the ground that such representations were false. (*Attwood v. Small*, 6 Cl. & F. 232, 7 Eng. Reprint, 684; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. ed. 678, 15 Morr. Min. Rep. 435; *Brown v. Smith*, 109 Fed. 26; *Hill v. Bush*, 19 Ark. 522; *Muir v. Pratt*, 18 Colo. App. 363, 71 Pac. 896; *Brackett v. Carrico* (Ky.), 38 S. W. 694; *Watson v. Austin*, 63 Miss. 469; *Whalen v. Tipton*, 31 Or. 566, 50 Pac. 1016; *Clapp v. Hoffman*, 159 Pa. 531, 28 Atl. 362.)

Since an attorney's fee is payable to the attorney, and not to the plaintiff, that provision, whether contained in one or more notes, is not usurious. (*Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555; *Rinker v. Lauer*, 13 Ida. 163, 88 Pac. 1057; *Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540; *Jones v. Stoddart*, 8 Ida. 210, 67 Pac. 650.)

The Guernsey notes and mortgages are not usurious on account of the provision for exchange. (*Central Bank v. Bank of St. John*, 17 Wis. 157; *Cornell v. Barnes*, 26 Wis. 473; *Buckingham v. McLean*, 13 How. (U. S.) 150, 14 L. ed. 90; 1 Jones on Mortgages, 6th ed., par. 637; 29 Am. & Eng. Ency. of Law, 499; *Stuart v. Saddlery Co.*, 21 Tex. Civ. App.

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530, 53 S. W. 83; *Anderson v. Creamery Package Mfg. Co.*, 8 Ida. 200, 101 Am. St. 188, 67 Pac. 493, 56 L. R. A. 554.)

The provision for payment of a higher rate, after default, is to be construed as a penalty and not as usury. The increased amount is payable, not because the borrower agreed to pay and the lender agreed to receive that amount, but because the borrower has breached his contract to make payments or perform other conditions. (*Lloyd v. Scott*, 4 Pet. (U. S.) 205, 7 L. ed. 833; 29 Am. & Eng. Ency. of Law, 507; *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. 932; *Trust Society v. Hogue*, 37 Or. 544, 62 Pac. 380, 63 Pac. 690; *Omaha Loan & Trust Co. v. Hanson*, 46 Neb. 870, 65 N. W. 1058.)

The note is the evidence of the debt and is the principal obligation of the debtor, the mortgage being simply incidental thereto, and, in case of variance or repugnance in their respective conditions or terms, the note will control. (*Mortgage Security Co. v. Casebier*, 3 Kan. App. 736, 45 Pac. 452.)

Under the provision that upon default the whole indebtedness shall become due and payable, such stipulation is to be construed as a penalty, which will not be enforced except upon canceling the unearned interest notes, and does not make the contract usurious. (*Dugan v. Lewis*, 79 Tex. 246, 23 Am. St. 332, 14 S. W. 1024, 12 L. R. A. 93; *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. 962, 103 N. W. 651, 9 Ann. Cas. 545.)

The mortgage indebtedness is not Ellsworth's debt; it is the joint debt of himself and his wife. Mrs. Ellsworth was legally competent to buy land, and to bind her separate property for the purchase price. She did not become a surety because she joined with her husband in the purchase, any more than she would have been a surety if she had made a joint purchase with some one else. (*Bank of Commerce v. Baldwin*, 12 Ida. 202, 85 Pac. 497; *Booth Mercantile Co. v. Murphy*, 14 Ida. 212, 93 Pac. 777; *Hall v. Johns*, 17 Ida. 224, 105 Pac. 71.)

SULLIVAN, C. J.—This action was brought by the plaintiff to foreclose three mortgages executed by the appellants. Two of the mortgages were executed by O. E. Guernsey, one

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to secure the payment of \$3,000 and one to secure interest notes on that \$3,000 debt. The other mortgage was given by the appellants to secure an indebtedness of \$8,300 evidenced by four promissory notes for \$2,000 each and one for \$300, payable to Norman Buck, with interest at seven per cent per annum, being the purchase price for an 800 acre tract of land near Waha in Nez Perce county. Said mortgage, in addition to the Buck ranch, covered eighty acres of land in what is known as the Orchard tract south of Lewiston, owned by Mrs. Ellsworth, one of the defendants.

The pleadings are very voluminous and cover about 190 pages of the transcript and put at issue many facts. By one of the cross-complaints, the appellant sought to bring in new parties, which application was denied by the court, and the court also denied an application for a continuance asked for by the appellants in order that the said new parties might be brought in.

Upon the issues made by the pleadings, the cause was tried by the court without a jury and findings of fact were made and judgment and decree entered in favor of the plaintiff upon the three causes of action, foreclosing said mortgages and directing the sale of the property covered by them for the payment of the amount found to be due, which was a little more than \$14,000. A motion for a new trial was overruled and this appeal is from the judgment and the order denying the new trial.

Twelve errors are assigned and discussed in a 154 page brief by counsel for appellants. Counsel for appellants state in their brief that they will not attempt to argue separately each alleged error, but urge that each assignment is well taken and should be sustained by the court.

It appears that the indebtedness evidenced by the promissory notes and mortgages grew out of a series of land speculations undertaken by the appellants, Mr. and Mrs. Ellsworth. They came to Idaho about the year 1900 and thereafter became acquainted with the late Judge Norman Buck. Shortly before such acquaintance, Judge Buck's brother had died, leaving 160 acres of land in what is now known as the Lewiston

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Orchards tract, near the city of Lewiston. The brother's estate was administered upon by the probate court. The Ellsworths offered to buy said 160 acre tract on credit, as they had no money, and asked Judge Buck to use his good offices with the administrator and heirs in furtherance of such purchase. This Judge Buck did and appellants acquired the land on terms which they were able to meet. They subsequently sold eighty acres of that tract for enough to pay the entire purchase price. The remainder of it is the eighty acre tract included in said mortgages.

For many years Judge Buck owned 800 acres of land near Waha, consisting of two tracts, 640 in one and 160 in the other. Said tracts were separated from each other by a tract of land owned by Miss Nettie Moore, a niece of Judge Buck. A part of Miss Moore's land was acquired by her under the homestead laws of Congress, and one piece of seventy-nine and the other of four and three-fourths acres were conveyed to her by Judge Buck. The seventy-nine acre tract was purchased in 1897 and the smaller tract in 1905. In the deeds conveying said tracts to Miss Moore, Judge Buck reserved the right of way to cross from one of his tracts of land to the other, and also the right of way to lay water-pipes or construct ditches across the land so deeded by him to her. In the deed of 1905, the right of way was reserved and also a right to share with her certain water. The 160 acre tract so held by Judge Buck lies on the hillside at a higher elevation than the Moore lands which adjoined it, and also higher than the larger tract of Buck's land which adjoined the Moore land. The surface ground and the natural flow and drainage of waters is downward from the 160 acre tract across Miss Moore's land to the larger tract of the Buck lands. The Moore lands and the Buck lands have upon them several small springs. There is some conflict in the evidence as to the amount of water which they supply, but that cuts no special figure so far as the decision of this case is concerned. In the irrigating season there is no natural flow from any of these springs except one upon the 160 acre tract of Buck lands. The flow from this spring runs down upon the land of Miss



Moore, and the evidence shows that she had diverted it from its natural channel at a point on her land and had been using it about twenty years to irrigate a small tract of land near her home. There is evidence tending to show that said spring only supplies sufficient water to irrigate a small piece of land.

It appears that the Ellsworths, after they had been successful in their purchase of the 160 acres of land belonging to the estate of Judge Buck's brother, became anxious to purchase Judge Buck's ranch. Judge Buck, it appears, was reluctant to sell, especially as the Ellsworths were not prepared to pay cash. However, the appellants visited said land during the month of August, 1906, and made a thorough inspection of the whole premises and the springs thereon. Judge Buck was not with them and they were shown over the land by Miss Moore. She did this for their accommodation and not as the agent of Judge Buck. They remained with her over night and spent another day in the investigation of the premises by themselves. It appears from Ellsworth's testimony that this investigation was quite thorough and complete. At that time Miss Moore was using, and had been for more than twenty years, the water which she now claims, and she called their attention to that fact. Miss Moore herself testified as follows: "He [Ellsworth] asked me in the presence of Senator [Teller] if I would sell those springs up there [meaning the springs from which she was getting water], and I told him no. He asked that again when he had lived there two or three months, and again, I think, if there were no springs of that kind up in his locality, and I said no." Ellsworth himself testified as follows: "Saw Miss Moore's garden and alfalfa patch; I didn't think it was over an acre there by the house. She was irrigating, I think so, for garden, orchard, etc."

After having made this inspection and ascertaining the facts in regard to the water, the Ellsworths not only urged Judge Buck to sell them the land, but it appears from the evidence, Mr. Ellsworth offered to pay Miss Moore, Storey Buck, a son of Judge Buck, and others if they would induce Judge Buck to sell said land to them. In the fall of 1906,

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after the Ellsworths had made a thorough investigation of said land and on the earnest solicitation of the Ellsworths, Judge Buck consented to sell the land to them. A draft of the contract of sale was prepared in Storey Buck's office and was submitted to Eugene O'Neill, Esq., Ellsworth's attorney, together with an abstract of title and the original deeds and right of way agreements between Miss Moore and Judge Buck. The abstract and original documents submitted were examined by Mr. O'Neill and the contract of sale was prepared by him, using the original deeds and said abstract for his data. In that transaction Judge Buck acted as his own attorney and O'Neill acted as the attorney for the Ellsworths. By the terms of said contract, the Ellsworths agreed to purchase and Buck agreed to sell, said land with such rights of way and water agreements appurtenant thereto as Judge Buck had, for \$16,000, \$5,000 payable by assuming a \$5,000 mortgage on the premises held by one Fitzgerald, and the balance payable \$1,000 in cash, \$2,000 November 15, 1908, and \$2,000 yearly thereafter until \$10,000 was paid, that being the amount of the purchase price in excess of said mortgage; deferred payments to draw interest at the rate of seven per cent. By this contract the Ellsworths agreed to buy and Buck agreed to sell.

After describing the lands, the contract provides that Buck shall transfer to the Ellsworths said land and property described as follows: "Also a right of way for a wagon track twenty (20) feet wide . . . as reserved in deed of Norman Buck to Nettie Moore, dated August 27, 1902, and also the right of way for ditches and pipes for water across the said land, as reserved in said deed. All those rights reserved to Norman Buck in his deed of December 11, 1905, in favor of Nettie Moore," etc. At the same time Ellsworth's attorney prepared a deed from Judge Buck and his wife to Ephriam G. Ellsworth, one of the appellants, which deed was signed, acknowledged and placed in escrow. This deed, in addition to conveying the lands, conveyed such right as Judge Buck had by virtue of his reservations in the deeds to Nettie Moore in the same identical language as used in said deeds. Said contract and deed disclose as clearly as it is possible to do

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that Buck intended and agreed to sell to appellants the land which he owned and whatever rights he might have under the reservations in his former deeds to Miss Moore. Not only was the abstract of said lands submitted to Ellsworth's attorney, showing what these rights were, but the original instruments reserving the rights were delivered to Ellsworth's attorney for examination and were used as the basis upon which the Buck contract and deed were drawn. Mr. O'Neill testified, among other things, as follows: "Judge Buck was to sell all he had out there and Ellsworth was purchasing the same, and I took the deeds to be the best evidence of what he would sell and I copied right from the original deeds."

Immediately after the purchase contract was executed the Ellsworths entered into the possession of the Buck lands. They also leased and entered into the possession of all of the lands there belonging to Miss Moore except the four and three-fourths acre tract where she resided. They had possession of and access to both the Moore and Buck lands, and full opportunity to become familiar with the land and the water on both tracts and with the nature and character of Miss Moore's user of and claims to the water and also the right of way over her land.

During the summer of 1907, Miss Moore used the water as she had always used it and Ellsworth assisted her in clearing out the ditches and conducting the water to her lands. Ellsworth also leased some cattle belonging to Miss Moore, over which they afterward had trouble, which Judge Buck settled between them at Ellsworth's request. At that time the contentions between Miss Moore and the Ellsworths were well defined and understood by the Ellsworths. They, however, made no claim of fraud or misrepresentation and made no effort to rescind their contract with Judge Buck. During all of the time after the Ellsworths took possession of said land under said contract of purchase and of the Moore land under the lease, they were crossing and recrossing the Moore land from one of the Buck tracts to the other, and some difficulty arose between them in regard to the places where the Ellsworths should cross the Moore land. On account of said diffi-

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culty, an action was instituted between Miss Moore and the Ellsworths and a decree was entered by the court in that suit against the Ellsworths, and the court therein made certain provisions as to the use of the water mentioned in the reservations of the Buck-Moore deeds, and declined to enter a decree establishing a right of way as claimed by the Ellsworths. If that decree was erroneous, the remedy was by appeal. It appears from the record that since the entry of that decree the appellants have conceived themselves to be in some way defrauded or cheated.

It appears from the record that the water which Miss Moore had been using was derived from springs on all of said tracts of land. It was abundant for stock and domestic purposes, and it appears that neither Ellsworth nor any other person had ever used any water on the Buck lands for irrigation, but had used one of the small springs on the larger tract for domestic purposes. In the summer of 1907, Ellsworth and Miss Moore each filed separate applications for water rights in the office of the state engineer, and an action is now pending in the district court to determine their several rights in regard to that matter. If it should appear in that case that Miss Moore's right to the use of said water was established by her twenty years of actual use thereof, we cannot see how that could have any influence or effect on the case at bar whatever.

Under the contract of purchase, the Ellsworths paid \$1,000 cash and were not required to make another payment until November 15, 1908, when an additional sum of \$2,000 became due. After he had been in possession of the premises a year and had become fully acquainted with every possible circumstance and fact in connection with the land and must have understood the conditions in regard to the water, he did not attempt to rescind said contract or make any claim against Buck whatever for a failure of any of the covenants in said deed, but did induce Judge Buck to waive the terms of the purchase contract and accept a payment of \$1,700 instead of \$2,000, and also to deliver the deed to him and accept a mortgage upon the premises and upon the eighty acre tract.

above mentioned that stood in the name of Mrs. Ellsworth, as security for the payment of the balance of the purchase price. There is no suggestion in the evidence that Judge Buck made any representations to Ellsworth at the time when this mortgage was executed to induce him to execute it, but at the solicitation of Ellsworth Judge Buck waived the terms of the original contract and substituted a new one.

In order to make the second payment on said land of \$1,700, Ellsworth and his wife borrowed from said O. E. Guernsey \$3,000, evidenced by the Guernsey notes and secured by the Guernsey mortgage set out in the complaint. Counsel for appellant contends that there was fraud and failure of consideration in this transaction. There is nothing in that contention whatever, as the clear preponderance of evidence shows that said land is reasonably worth all that the Ellsworths agreed to pay for it. The evidence fails to show any misrepresentations on the part of Buck or any fraud whatever practiced by him. Counsel contend that there was a partial failure of consideration by reason of the fact that the appellants did not get certain water which they aver they were entitled to under the deed from Buck. Judge Buck sold them only such rights as he held, and if they have lost their right to any water by their failure to make a proper appropriation thereof, it is their own fault and not the fault of Judge Buck. They knew more than a year before they executed the mortgages in question that no irrigation works of any kind had been begun and that no application of any water whatever had been made to said land, and that to complete an appropriation of water, it required actual application of the water to the land. It is sufficient to say that the Ellsworths' inspection of the land itself and their possession of it for more than a year disclosed all of those facts. After knowing all this, he waived the original contract, and procured Judge Buck to deliver him the deed to the lands and accept a mortgage to secure the deferred payments thereon. The waiving of the original contract and the acceptance of a deed and the execution of a mortgage upon different terms would waive any

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question of fraud, had any existed. But none whatever existed. (*Smith v. Smith*, 4 Ida. 1, 35 Pac. 697.)

Counsel for appellants next contend that the Guernsey mortgages are usurious for the following reasons: (1) That two mortgages and two sets of notes were given to secure one debt, each providing for attorney's fees. (2) That the notes and coupons, while payable at a local bank, provide for New York exchange. (3) That while the principal note clearly provides for eight per cent interest after default, the principal mortgage in one part of the printed form reads "ten per cent." (4) That the notes provide, upon default, that the whole sum of principal and interest, whether earned or not, shall become immediately payable at the option of the holder.

As to the first contention that two mortgages and two sets of notes were given to secure one debt, each providing for attorney's fees, that contention would apply equally to any loan where the evidence of debt was split up into several notes. This court has held that since an attorney's fee is allowed for the payment of the attorney, that provision, whether contained in one or more notes, is not usurious. If the provision for an attorney's fee is used as a device to conceal actual usury and evidence to that effect were properly submitted, the note would, of course, be held usurious. As the record appears, the court is urged to presume that because a lender takes several notes to evidence one indebtedness, each providing for an attorney's fee, that that fact alone constitutes usury, although this presumption is repudiated on the face of the notes by the fact that the loan is for less than the legal rate. We cannot concur in that contention. In *Broadbent v. Brumback*, 2 Ida. 366, 16 Pac. 555, this court said: "The appellants claim also that the attorney fee is but usury in disguise, and ought not to be allowed. In *Lloyd v. Scott*, 4 Pet. 205 [7 L. ed. 833], Justice McLean says: 'When a party agrees to pay a specified sum, exceeding lawful interest, provided he do not pay the principal by a day certain, it is not usury.'" (*Rinker v. Lauer*, 13 Ida. 163, 88 Pac. 1057; *Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540; *Jones v. Stoddart*, 8 Ida. 210, 67 Pac. 650.)

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Subd. 5 of sec. 3459, Rev. Codes, provides that costs of collection or attorney's fees in case payment shall not be made at maturity may be stipulated for. That may be done in an interest note as well as in a principal note.

As to the stipulation for exchange being an usurious contract, this court is aware that some early decisions in this country held to that effect. It was during a period of the country when exchange was very high, but unless it is made to appear that the stipulation for exchange is a device to cover a usurious contract, under recent decisions it is held not to be usury. In *Cornell v. Barnes*, 26 Wis. 473, the court had under consideration this question, and said:

"It seems very clear that there was no usury in this mortgage by reason of the stipulation for exchange—conceding that where exchange is contracted for as a mere mode of obtaining more for the use of the money than legal interest, and without any design that it shall be remitted to the place upon which exchange is provided, it would be usury. Where such is not the case and the exchange is stipulated for in good faith as payment for the transportation of the money, it does not make the contract usurious, even though in addition to the highest rate of interest allowed by law. In such case it is not paid as interest. It is not paid for the use of the money. But it is paid only as the expense of making the payment itself at the place where the parties might have contracted that it should be made."

It is the well-settled rule of law that a charge for exchange, unless used as a cover for usury, is legal and not usurious. (*Buckingham v. McLean*, 13 How. (U. S.) 150, 14 L. ed. 90. See, also, 1 Jones on Mortgages, 6th ed., sec. 637; 29 Am. & Eng. Ency. of Law, 499.)

In the case at bar, the reason for the insertion of the provision for exchange is clearly shown by the complaint. Guernsey was a resident of Dubuque, Iowa, and wanted the payment made in New York City. It also appears that afterward arrangements were made with the bank at Lewiston to transmit the money without the payment of any exchange.

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and no exchange has been exacted. It is clear that the contract for exchange is not a cover for usury.

It is next contended that the mortgage provides for ten per cent, while the promissory note to secure the payment of which the mortgage was given only provides for eight per cent and that the stipulation in the mortgage must control. There is nothing in that contention. The promissory note represents the principal obligation of the debtor and the mortgage is only an incident thereto. It is evident that the mortgage was on a printed form which contained a provision for ten per cent, and the scrivener had neglected to make the change in accordance with the terms of the promissory note. When there is a conflict between the note and the mortgage, the provisions of the note must control. (*New Eng. Mtg. Sec. Co. v. Casebier*, 3 Kan. App. 736, 45 Pac. 452. As bearing upon this case, see, also, *Anderson v. Creamery Pkg. Mfg. Co.*, 8 Ida. 200, 101 Am. St. 188, 67 Pac. 493, 56 L. R. A. 554.) It appears from the record that the plaintiff purchased the Guernsey notes and mortgages, if not at the request, certainly with the knowledge, of the Ellsworths, and without any knowledge that there was any defense whatever to them. The notes provide for less than the legal rate of interest, which thus removes any question of usurious intent. It is clear to us that the respondent purchased these notes for full value and in good faith.

The next contention is that the promissory notes are usurious, for the reason that upon default in payment of either principal or interest it is provided that the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of the notes; that under this stipulation the interest that has not matured would become due in default of payment. We think the proper construction of the stipulation is that the whole of the principal may become due at the option of the holder in default of payment, but no unearned interest becomes due. That stipulation is in the nature of a forfeiture and was not intended to be and is not a usurious contract, and a court of equity will not enforce the stipulated penalty as to the forfeiture of un-



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Opinion of the Court—Sullivan, C. J.

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earned interest, and the stipulation will not be enforced except upon the cancellation of the unearned interest notes.

In *Dugan v. Lewis*, 79 Tex. 246, 23 Am. St. 332, 14 S. W. 1024, 12 L. R. A. 93, the court had under consideration a deed of trust that contained a provision to the effect that if the borrower of the money failed to pay the indebtedness as stipulated, the whole sum of money secured thereby should become due and the whole amount of interest for the entire period should be collectible according to the terms of the contract. The court held in that case as follows:

“We do not think that a correct construction of the contract will make a greater amount of interest due and collectible upon it than shall have accrued on the principal calculated up to the date of collection at the rate named in the note, or, in other words, that any unearned interest comes within the proper meaning of the stipulation. In any event, we agree with the conclusion of the judge before whom the cause was tried, that the said stipulation ‘is to be construed as a penalty, which will not be enforced except upon canceling the unearned interest notes, and that it does not make the contract usurious.’” (See, also, *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. 962, 103 N. W. 651, 9 Ann. Cas. 545.) In the case at bar, the court gave judgment only for the interest due at the date of the judgment.

Counsel for appellant also contends that the time for paying the Guernsey notes had been extended for one interest period, at least. Applying the evidence to this contention, we find that it was not the intention of Tipton to extend the time for any definite period, but only for time sufficient to allow the Ellsworths to ascertain whether a settlement of some kind could be made in regard to the Buck notes and mortgage, and it was ascertained that no compromise could be made as to the Buck notes.

Some objection is raised to the decree on the ground that it leaves the sheriff to segregate and apportion the cost between the several tracts. That is not a valid objection to the decree. It is contended that under this decree Mrs. Ellsworth's property might be sold first, and in that way the

## Opinion of the Court—Sullivan, C. J.

property of a surety would be subjected to the payment of the debts of the principal. We do not think there is any reason to consider Mrs. Ellsworth a surety upon this indebtedness. While the trial court found certain parts of the mortgaged property was her separate property, at the request of the defendants, we are unable to find anything in the record which would suggest that she is a surety. She and her husband both contracted to purchase the Buck property and the purchase price was her debt as much as his. Under our statute she has full power to make a contract and to bind her separate property. So far as this case is concerned, it is immaterial what part of the mortgaged property is sold first. The statute provides that the debtor may direct the order in which the property shall be exposed for sale, and the decree does not deprive them of that right. In the case at bar, no personal judgment was rendered against her and no deficiency judgment is provided for against her by the decree. The original contract was made with Judge Buck, was signed by Mrs. and Mr. Ellsworth, and the evidence shows that she participated in all the negotiations. The title was subsequently taken in her husband's name, but this was done at the request of herself and husband. This court held in *Bank of Commerce v. Baldwin*, 12 Ida. 202, 85 Pac. 497, as follows: "There can no longer be any question in this state as to the power of a married woman to bind her separate property and estate for the payment of a debt." (*Booth Mercantile Co. v. Murphy*, 14 Ida. 212, 93 Pac. 777; *Hall v. Johns*, 17 Ida. 224, 105 Pac. 71.)

It will serve no good purpose in this opinion to quote extensively from the evidence, as it is very voluminous and covers many pages of the transcript. It is sufficient to say that we have examined the evidence carefully, and conclude that the findings of fact are fully sustained by it.

It will not be necessary for us to discuss further any of the errors assigned. We have carefully examined each of them and find no reversible error in the record. The judgment is therefore affirmed, with costs in favor of respondent.

Stewart and Ailshie, JJ., concur.

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Points Decided.

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## ON PETITION FOR REHEARING.

(June 7, 1910.)

PER CURIAM.—The appellant, Sarah M. Ellsworth, has filed a petition for a rehearing in this case in which she calls our special attention to some features of the evidence with reference to the water right appellants claim to have acquired in their purchase of this land. We have given the matters mentioned in her petition further consideration. We do not find, however, such a condition of facts developed as would justify us in reversing the judgment of the trial court. The matters discussed in this petition are substantially the same questions presented on the original hearing. The petition must be denied, and it is so ordered.

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(May 14, 1910.)

WILLIAM F. NICHOLLS and WILLIAM GRIBBLE, Respondents, v. LEWIS & CLARK MINING COMPANY, Appellant.

[109 Pac. 846.]

## MINERAL LOCATION—EXCESSIVE AREA—FRAUDULENT LOCATION.

(Syllabus by the court.)

1. Where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed.

2. Where the exterior boundaries of a mineral location include such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as

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Argument for Respondents.

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located under the statute, such location will be held void on the ground that the boundaries of the claim have never been marked and established as required by law.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Action by plaintiffs in support of an adverse claim to establish the title to a certain mining claim called the "Senator." Judgment for the plaintiffs and the defendant appealed. *Reversed.*

Gray & Knight, Wm. K. Shissler, and Therrett Towles, for Appellant.

The locations of the respondents were so excessive in size as to be void. Where four locations as in this case are so excessive that they include within their exterior boundaries an area that is more than the law allows for nine full claims, the same are certainly void under the decisions of this court, and under the spirit and the letter of the mining law. (*Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320; *Burke v. McDonald*, 2 Ida. 683, 33 Pac. 49; *Stemwinder Min. Co. v. Emma etc. Min. Co.*, 2 Ida. 456, 21 Pac. 1040.)

The object of a location notice is to guide a subsequent locator and to afford him information as to the extent of a prior location. Whatever does this fairly and reasonably should be held to be a good notice. (*Londonderry Min. Co. v. United Gold Mines Co.*, 38 Colo. 480, 88 Pac. 457; *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723; *Morrison v. Regan*, 8 Ida. 291, 67 Pac. 955; *Atkins v. Hendree*, 1 Ida. 100; *Lindley on Mines*, sec. 362; *Snyder on Mines*, 397, 398.)

Kerns & Ryan, for Respondents.

"The general rule is that the location of a claim excessive in size will only be void as to the excess, if the excess is not

## Opinion of the Court—Ailshie, J.

attributable to a fraudulent act of the locator but to an innocent mistake." (27 Cyc. 561; *Howeth v. Sullenger*, 113 Cal. 547, 45 Pac. 841; *Gohres v. Illinois etc. Co.*, 40 Or. 516, 67 Pac. 666; *Richmond Min. Co. v. Rose*, 114 U. S. 579, 5 Sup. Ct. 1055, 29 L. ed. 273; Lindley on Mines, sec. 362; *McIntosh v. Price*, 121 Fed. 716, 58 C. C. A. 136; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480; *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505; *Jupiter Min. Co. v. Bodie C. M. Co.* (Cal.), 11 Fed. 666; *Atkins v. Hendree*, 1 Ida. 95; *Stemwinder Min. Co. v. Emma & Lost Chance Con. M. Co.*, 2 Ida. 456, 21 Pac. 1040.)

AILSHIE, J.—This is an adverse suit which was commenced by the respondents claiming to be the owners of the Senator lode claim, with which it was alleged the Louis and Clark lode-claims conflicted. On September 4, 1905, W. Z. Pepper, a prospector and the predecessor in interest of the appellant corporation, discovered a vein of mineral-bearing rock in the Hunter mining district, Shoshone county, and thereupon posted two notices of location, one for the Louis and the other for the Clark claim. The validity of the discovery is not questioned. At the time of making the discovery and posting the notices, Pepper met the respondent Gribble, who informed him that he (Gribble) owned certain claims which embraced the ground Pepper was about to locate. It seems that he then stated that he owned ground embraced in four claims in a compact body, being 3,000 feet in length by 1,800 feet in width. These claims were named, respectively, the Senator, Lost Booze, Prize and Princess. The claim with which it is urged that Pepper's locations conflicted was the so-called "Senator."

At the time of Pepper's discovery and location he did not know of the existence of the Senator claim except what Gribble told him. Gribble did not, and apparently could not, show Pepper the stakes to the Senator claim. Pepper testifies that Gribble did not point out or show him any of the stakes or corners or the discovery on the Senator, but that, on the contrary, Gribble told him that the stakes had either

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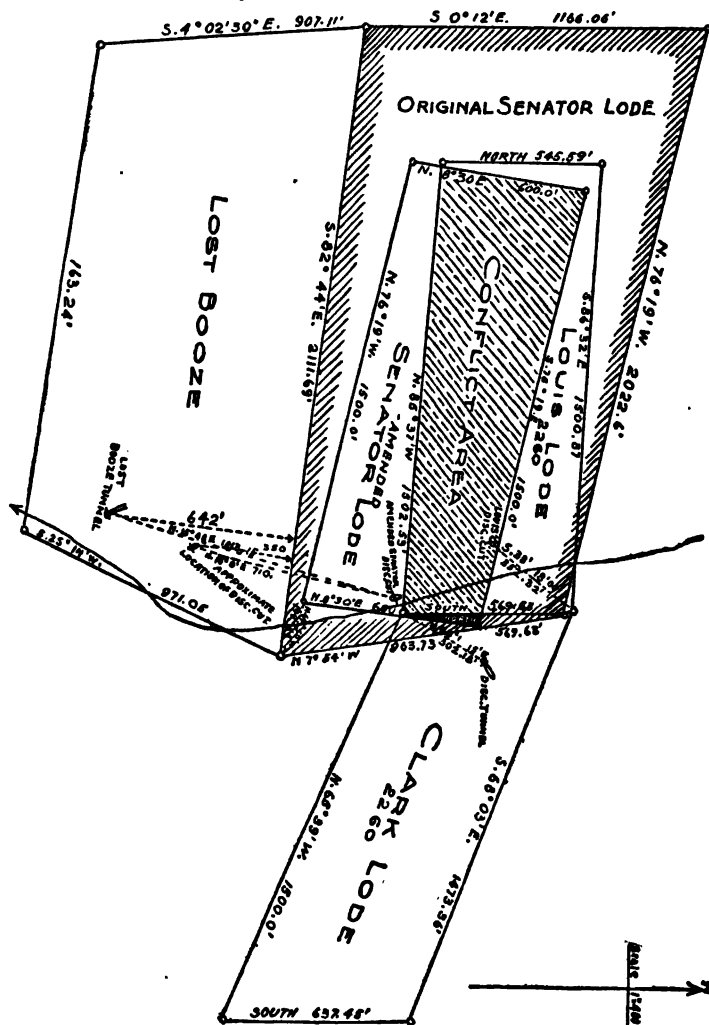
been removed or burned down. Gribble, however, testifies that he pointed out the stake at the southeast corner of the Senator and also the east center end stake. He says: "I told him [Pepper] where they were,—two or three of the corners. Only one of them stakes I told him at the southeast corner of the Senator and the center post. I didn't know where the others was; I couldn't find any." After this conversation, Pepper went to the county recorder's office at Wallace and ascertained from the records the names and descriptions of the claims that Gribble had located in that locality. He found that the location notice of the Senator described that claim as adjoining the Lost Booze on the north and the Princess on the east. He also found that these various location notices claimed ground to the extent of 600 feet in width and 1,500 feet in length for every claim. He thereupon returned to the ground, taking with him a 100-foot tape measure, found the discovery cut or shaft on the Lost Booze claim, measured 900 feet north from this discovery, which allowed 300 feet for the north half of the Lost Booze and a full width of 600 feet for the Senator. He there established the south line of the Lewis claim. He thereupon staked his claim and also located to the east of that claim the Clark lode. These claims as then located and staked on the ground contained substantially the same area and practically identical lines with the same claims as surveyed for patent.

The evidence on the part of the appellant shows that Pepper and his associates and those who worked for him were unable to find any of the stakes on the Senator claim except one tree that was squared and on which there were no markings, and on which Pepper testified that Nicholls marked as the east center end of the Senator subsequent to Pepper's location of the Louis. It is conceded by all parties that there was no location notice posted on the Senator at the time of the Louis location.

The testimony of the respondents, Nicholls and Gribble, and their witnesses shows that the Lost Booze claim was located in 1901 and the Prize, Princess and Senator were located in

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1903. The Lost Booze, the Senator and the conflict with the Louis and Clark claims are shown by the following diagram made from the surveyor's notes:



The Prize claim adjoins the Lost Booze on the west and the Princess adjoins the Prize on the north and the Senator on the west. These two claims, however, are not involved in

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this case, and only appear as two of the group of claims which the respondents were attempting to hold at the time of the location by Pepper of the Louis and Clark claims.

On about the 18th of September, 1906, the respondents employed an engineer to make a survey of these four claims. It was ascertained from that survey that the ground covered by the four locations comprised a compact area of about 4,649 feet in length by 2,075 feet in width; whereas it could lawfully have embraced in the four locations only an area of 1,200 feet in width by 3,000 feet in length. It was also shown by that survey that the Senator claim had an average width of about 1,065 feet by an average length of about 2,067 feet. In other words, this claim embraced an area equal to more than two and one-third full claims. The respondents therefore had actual knowledge from September, 1906, of the area and extent of the Senator claim as they insist that it was staked on the ground. They made no effort, however, toward drawing in their lines or making an amended location until after the appellant had applied for patent and after the respondents had filed their adverse suit. Their lines were not readjusted until March 31, 1908, on which latter date the surveyor made an amended location and they staked the ground to conform with the amended location which covers the ground in conflict in this action.

It is contended by the appellant in this case that respondents' locations of the Senator, the Lost Booze, the Prize and Princess are so excessive in area as to render the locations void. While counsel for appellant do not place their reliance in so many words on failure of the locators to properly mark the boundaries of their claims by establishing at each corner thereof and at any angle in the side lines a monument marked with the name of the claim and corner, etc., as required by the statute (sec. 3206, Rev. Codes), still the argument leads to that conclusion and results in that position. It is said in the brief that the location is a fraudulent location by reason of the excessive area embraced within the pretended external boundaries, and that this fraud is further emphasized and established by the fact that although the locators had positive



proof in September, 1906, when the survey was made, of the excessive size of the claims, still no effort was made to adjust the external boundaries or to re-establish the corners and the stakes and monuments upon the true line as required by law until after the appellant had applied for a patent and the adverse suit had been instituted.

Considerable discussion has taken place among the courts and text-writers as to the effect of a location which includes within its boundaries an area in excess of the statutory maximum. After an examination of all the authorities that have been called to our attention bearing on this subject, we are inclined to the belief that the more reasonable rule, and one eminently just and equitable, is that adopted by this court in *Burke v. McDonald*, 2 Ida. 679, 33 Pac. 49. The court there said:

“Were the boundaries of the Mammoth so large as to render the location void? Easterly of the discovery point it was marked about one hundred and fifty feet longer than the calls of the notice, and was considerably wider than allowed by law, while the westerly one thousand feet was marked substantially correct in size. Strict accuracy in the marking of claims cannot be expected or required. The character of the ground over which the locator must make his measurements must be considered; if even, with unobstructed view, greater accuracy would be required than when the surface is broken, and covered with timber. If a claim is made excessive in size with fraudulent intent, it is void. If made so large that it cannot be deemed the result of innocent error, fraud will be presumed, or if from any cause it be made so large and with such indistinct markings that its boundaries cannot be readily traced, and subsequent locators, after reasonable diligence, cannot find the same, it would be void, as against another location made in good faith. Just what excess will be tolerated, or what will vitiate, cannot be defined, but must depend somewhat upon the circumstances of each case. In Montana, it has been held a claim located 1,763 feet long is void, and the tendency there is toward strict accuracy of boundary; while in other courts it has been held that in the absence

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of fraud, the claim will be held void only as to the excess. (*Stemwinder Case*, 2 Ida. 456, 21 Pac. 1040; *Mining Co. v. Rose*, 114 U. S. 579, 5 Sup. Ct. 1055, 29 L. ed. 273; *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11 Fed. 675.) In this case it appears the ground is such that accuracy in measurement could not be expected; also that the Lackawanna was discovered and located mostly on the westerly end of the Mammoth, where the latter was correctly marked. It cannot be presumed, from all the circumstances of the case, the Lackawanna locators were misled by these markings, and the conclusion of the trial court is sustained."

Substantially the same rule was suggested by the supreme court of Oregon in *Gohres v. Ill. & J. Gravel Min. Co.*, 40 Or. 516, 67 Pac. 666, wherein that court said:

"Where an excessive location has been made through mistake, while acting in good faith, as where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess. This rule is of general application, except, it may be, where the excess is so large as to give rise to an inference of bad faith."

Substantially the same statement was made in *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. ed. 273. This latter case, however, has been cited by some text-writers as supporting the contention that the location of an excessive area will never avoid the claim but will only render it voidable to the extent of the excess. The question that was being discussed by the supreme court in that case, as well as the language used by the learned justice who wrote the opinion, entirely fails to justify the assertion that this case goes to the extent claimed. The opinion in that case specifically bases the rule announced on the principle of "good faith" in the locator.

It is true, as contended by appellant, that it has been held by the supreme court of Montana in two cases (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714, and *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320), that "The location of a mining claim must conform in all respects to the statute authorizing it and boundaries beyond the extent of the location are no

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Opinion of the Court—Ailshie, J.

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boundaries at all," and accordingly the court held that a claim that was staked and marked on the ground 2,000 feet in length was in fact and in law not marked and bounded on the ground at all and was therefore void. We think that rule is too strict and severe, and we would not be willing to go to that extent.

Mr. Lindley, in vol. 1, sec. 362, of his work on Mines, speaking of this subject, says:

"The courts uniformly hold that such a location, where it injures no one at the time it is made, and where it has been made in good faith, is voidable only to the extent of the excess. . . . An excessive location cannot be said to be a fraud upon others. It cannot take away rights already acquired by prior appropriation. A location within the statutory limit cannot accomplish this. As to subsequent locators, they can measure the ground from the preliminary discovery notice, which is universally posted at, or in reasonable proximity to, the point of discovery."

It should be remembered that it takes more than the posting of a "discovery notice" to constitute a valid location of a mining claim. (Sec. 3206, Rev. Codes, and sec. 2320, Rev. Stat. U. S.) It is just as essential that the exterior boundaries of the claim be marked by the setting of posts and the erection of monuments as it is that a discovery notice be posted. Indeed, the general rule prevails that courses and distances give way to the actual monuments and markings on the ground. It is eminently fair and reasonable and just to say that an innocent mistake has been made when the exterior boundaries of a claim are marked on the surface of the ground twenty-five, fifty or possibly one hundred feet beyond and in excess of the area to which the claimant is actually entitled under the statute, and that such posts and monuments impart notice to a prospector who is looking for vacant, unappropriated public domain on which to locate a mining claim. These monuments and markings on the surface of the ground may be further said to direct the prospector to look for the location notice and the discovery shaft or tunnel on the claim. In such case, however, he has a right to assume that he will

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find the location notice and the discovery within the boundary of a statutory claim from the point where he discovers the monuments. If, however, the exterior monuments and boundaries as established by the locator, instead of being 100 feet beyond where it should be located, be 500 feet away, what is to be said of the notice it imparts to the prospector, or as to whether this in fact constitutes the exterior boundary of a valid claim that has been located in conformity with law? But if there still be any doubt about the validity of the claim when the exterior boundary is as remote as 500 feet beyond what the law permits, can there be any doubt about it when it is 5,000 feet beyond the maximum limit allowed by law? Is the prospector in such a case to sweep the country for a distance of 5,300 feet or 6,500 feet, as the case may be, to find the discovery hole and the discovery or location notice on the claim in order to measure off a statutory claim? In such a case is it not a fact that no valid location has ever been made for want of established monuments and posts and the marking of the exterior boundaries of the claim? In such case can it be said that there is any valid location? Is it not as much a fraud on the prospector, who is looking for vacant ground on which to locate a mining claim, to hold such an excessive location valid and thereby exclude him from locating, as it would be to allow the prior would-be locator to exclude him from any other portion of the public domain?

We are perfectly safe, we think, in saying that all the authorities, with the possible exception of the two Montana cases, are in accord in holding that a location in a reasonable excess of the maximum area allowed by law, which is honestly and innocently made, will be permitted and sanctioned by the courts to the extent of a lawful claim. But just the point at which the excess becomes so great as to render the attempted location void has never been definitely enunciated by any of the courts so far as we are able to find. And yet it is perfectly apparent that we must reach a limit some time, beyond which no court would hold that there had ever been made any valid location, by reason of the stakes and monuments attempting to include such an excessive and enormous area of

the public domain as to amount to no markings on the ground at all and imparting no notice to the prospector, and therefore being a total failure to comply with the statute in its requirements that the locator shall "mark the boundaries of his claim by establishing at every corner thereof, and at any angle in the side lines, a monument marked with the name of the claim and the corner or angle it represents," etc. The locator cannot be allowed to stake off a section or a township and hold it as one claim. This must necessarily be determined upon the facts of each case. The general character and topography of the country, the conditions and season of the year in which the location was made, the opportunity the locator has had for learning that he has made an excessive location, his facilities for measuring the claim and his subsequent conduct with reference to the area embraced in the claim, are all proper subjects of inquiry and consideration in determining the good faith of the locator of the excessive claim.

Mr. Snyder, in vol. 1, of his work on Mines, at sec. 397, in considering this question and referring to *Burke v. McDonald*, says:

"The supreme court of Idaho, on the other hand, has reached a conclusion somewhat more liberal than the Montana court, holding that if the excessive boundaries are the result of innocent error, the claim should be held valid, except as to the excess which is rejected; but if the excessive boundaries are laid with fraudulent intent, the entire claim is void. As indicated in the beginning of this section, the latter rule seems the sound one. . . . The principal obstacle to be encountered in applying the doctrine enunciated by the Idaho court, as we view it, is that it would be a very difficult matter to ascertain in a particular case whether the excessive boundaries were laid with fraudulent intent. The court certainly could not say as matter of law that they were so laid, and if the question is considered one of fact, we hardly see just how it would be proved. And, after all, what object has the locator to attempt to include more ground in his location than is authorized by law? When he makes his location he has

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the statute staring him in the face, and knows that whenever he applies for a patent to his claim he will then be restricted to the amount authorized by law. We think the Idaho court had the correct understanding of the matter, and reached the conclusion, which should have been followed in the later cases, when it said, speaking through Chief Justice McBride: 'If he claims more than the law allows, it is void for the excess. . . . To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it.'''

It will be observed that the author here calls attention to the case of *Atkins v. Hendree*, 1 Ida. 95, in which Chief Justice McBride, speaking for the territorial court, enunciated the rule from which Mr. Lindley has evidently gathered the substance of his text, to which we have heretofore adverted. We desire to say at this time that we are not in accord with the latter portion of the opinion in *Atkins v. Hendree*, which is quoted by the learned author and to which he calls specific attention. We do not think it is the duty of the prospector who finds a post or other monument erected as a part of the exterior boundary of a mining claim to sweep the country for an unreasonable distance to find a location or discovery notice. If he has any doubt about the monuments properly marking the exterior lines of the claim, it is his duty to examine within the limits and territory which the statute authorizes such a claim to include and perhaps a reasonable area contiguous thereto. But it would be a clear fraud on him to charge him with notice of the contents of a discovery or location notice at an unreasonable distance beyond the limits or confines of a claim which the monuments found or discovered could properly include.

Coming now to the facts of this specific case, we are impelled to hold that the excessive area included in the Senator and Lost Booze locations, when considered in the light of subsequent events, clearly avoids the Senator location and renders it a nullity. The locator of the Senator learned definitely and to a certainty in September, 1906, that he had included within the exterior boundaries of that location an area suffi-

cient for two whole claims and more than one-third of another claim, and yet he made no effort to readjust his boundaries,—to set new stakes and monuments, until after this adverse suit had been filed; and this, too, notwithstanding the fact that the locators of the Louis and Clark claims had been doing their work on those claims and had been developing them, and that their successor in interest had done the work which it claimed sufficient to entitle it to a United States patent for the claims. Finally, when the locators of the Senator claim came to adjust their boundaries, they did the very thing that such excessive locations would permit, and that is to swing the claim; and so they moved the claim on the east so that the southern boundary line would not touch the Lost Booze, and then swung the west end of the claim north until it was removed more than 200 feet from the north line of the Lost Booze. All the while their location notice, as it appeared of record, had advised appellant and all the world that the Senator was a contiguous and adjoining claim to the Lost Booze on the north. They also adjusted their claim so as to take everything within their original exterior boundaries on the east, and thereby threw off more than 500 feet on the west. This, of course, was perfectly proper and legitimate if it is permissible to locate a claim with so vast an area and thereafter so adjust the lines within the exterior boundaries of a large location as to take according to the calls of the notice. This amended location was swung so as to include the discovery shaft on the Louis claim. These are the very things against which the law is made to protect prospectors. It should be further observed that at the time of the location of the Louis and Clark there was no discovery or location notice posted on the Senator. Indeed, it is admitted by the locators of the Senator that the location notice had been destroyed prior to this time. Of course, the law does not require the locator of a claim to keep his notice up perpetually, but the fact that it was gone shows the difficulty, if not the impossibility, of the locators of the Lewis and Clark discovering the calls or situs of the notice, and thereby fixing the true maximum boundaries of the Senator claim on the ground.

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Opinion of the Court—Sullivan, C. J., on Petition for Rehearing.

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It is also clear that if any discovery cut actually existed on the Senator, it was very indistinct. It is the duty of the locator to mark the boundaries of his claim and it is the duty of the subsequent locator to keep outside of and beyond those boundaries.

Viewed in the light of subsequent events and the evidence of bad faith furnished by the locator himself, it is clear that the Senator location is fraudulent and void and was not made in good faith. The judgment in this case should be reversed, and it is so ordered, and the cause is remanded. Costs in favor of appellant.

Sullivan, C. J., and Stewart, J., concur.

ON PETITION FOR REHEARING.

(June 22, 1910.)

SULLIVAN, C. J.—A petition for a rehearing has been filed in this case. Counsel contends that there was a conflict in the evidence on certain points, in which we have reversed the trial court's findings, and also contends that this court erred in holding that if any discovery cut actually existed on the Senator claim, it was very indistinct, and that the measurements referred to should have been made from the discovery point on the Senator claim instead of the discovery on the Lost Booze claim.

After this court held that the Senator location was absolutely void because of the excessive area it contained, it mattered not what the findings of the trial court were with reference to the discovery point on the Senator claim. If the location was absolutely void because of the excess, it could not be sustained under any findings whatever with reference to the discovery, as it takes more than a discovery to make a valid location.

After a careful consideration of the case, we are clearly of the opinion that a rehearing should not be granted. A rehearing is therefore denied.

Ailshie, J., concurs.



Argument for Defendants.

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(May 16, 1910.)

**WILLIAM BALDERSTON, Plaintiff, v. JAMES H. BRADY  
et al., Defendants.**

[108 Pac. 742.]

## ON MOTION TO MODIFY OPINION.

B. S. Crow, and Wyman &amp; Wyman, for Plaintiff.

The federal courts have uniformly held that nothing less than an official survey by the federal government will serve to identify public land. It follows that, until this is done, the federal government retains the exclusive right of possession as well as a species of title—indeed, the custody, control and limited right of alienation is still in the federal government until survey, despite the grant *in praesenti*. (*Hibberd v. Slack*, 84 Fed. 571; *Minnesota v. Hitchcock*, 185 U. S. 370, 22 Sup. Ct. 650, 46 L. ed. 954; *South Dakota v. Riley*, 34 L. D. 657; *Heydenfeldt v. Daney etc. Co.*, 93 U. S. 634, 23 L. ed. 995; 13 Morr. Min. Rep. 204.)

The state has no power to sell or lease the unsurveyed sections 16 and 36. (*United States v. Montana L. & F. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. ed. 604; *Hibberd v. Slack*, *supra*; *United States v. Birdseye*, 137 Fed. 516, 70 C. C. A. 100; *Clemmons v. Gillette*, 33 Mont. 321, 114 Am. St. 814, 83 Pac. 879.)

D. C. McDougall, Attorney General, O. M. Van Duyn, and J. H. Peterson, Assistants for Defendants.

The grant of 1890 (Idaho Admission Bill) was a grant *in praesenti*. (*Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Leavenworth L. N. G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *D. & R. G. R. Co. v. Alling*, 99 U. S. 733, 25 L. ed. 438; *Mo. K. & T. R. Co. v. Kan. Pac. R. Co.*, 97 U. S. 491, 24 L. ed. 1095; *St. P. & P. R. Co. v. N. P. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77; *Desert Salt Co. v. Tar-*

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pey, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. ed. 999; *Wisconsin Central R. Co. v. Price County*, 133 U. S. 196, 10 Sup. Ct. 341, 33 L. ed. 687; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338.)

Broader than the general rule announced in the foregoing cases, the following cases seem to hold more specifically that no grant as above set out acts as a grant *in praesenti* until the survey of the land has been made—that is, the complete title does not pass from the United States to the state until the survey has been made and the particular land identified. (*Heydenfeldt v. Daney Min. Co.*, 93 U. S. 634, 23 L. ed. 995, 13 Morr. Min. Rep. 204; *Minnesota v. Hitchcock*, 185 U. S. 370, 22 Sup. Ct. 650, 46 L. ed. 954; *United States v. Montana Lumber etc. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. ed. 604; *Kissell v. St. Louis Public Schools*, 18 How. 19, 15 L. ed. 324; *West v. Cochran*, 17 How. 403, 15 L. ed. 110; *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338; *United States v. Birdseye*, 137 Fed. 516, 70 C. C. A. 100; *Rogers etc. Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. ed. 552; *Michigan etc. Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. ed. 591; *Clemmons v. Gillette*, 33 Mont. 321, 114 Am. St. 814, 83 Pac. 879; *Hibberd v. Slack*, 84 Fed. 571; *Higgins v. Houghton*, 25 Cal. 252, 13 Morr. Min. Rep. 195; *Papin v. Ryan*, 32 Mo. 21; *Bres v. Louviera*, 37 La. Ann. 736; *Sherman v. Buick*, 45 Cal. 656; *Middleton v. Low*, 30 Cal. 597; *South Dakota v. Riley*, 34 L. D. 657; *South Dakota v. Delicate*, 34 L. D. 717.)

AILSHIE, J.—A motion has been made in this case by the attorney general for a modification of that portion of the opinion which deals with the state's rights in sections 16 and 36 and of the powers of the land board with reference to such lands. It is said in support of this motion that the opinion of the court is cited in other litigations as authority for the contention that the state board of land commissioners has no power to apply for or take title to any lands in lieu of sections 16 and 36. In that respect the opinion certainly

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needs no modification, for the simple and conclusive reason that the court has never so held.

The question the court was dealing with was not the power of the board to *acquire* title to lands for the use of the state, but rather the board's power of *disposition* of state lands. The state land board has undoubted power, under the constitution and statute (Const., sec. 8, art. 9, and sec. 1564, Rev. Codes), to acquire title to any and all lands which the general government may at any time give or grant to the state, and this is true whether the grant be general or special or in lieu of lands "lost" or "otherwise disposed of." And so the power and authority of the board, acting as the agent of the state, to acquire and take title to grants or gifts of land for the use of any of the institutions or instrumentalities of the state is beyond question or doubt. It is the power of the board to dispose of and convey away the lands of the state that has been guarded and hedged about by the people in the constitution itself.

It was said in the original opinion that the question of the state's title to sections 16 and 36 did not directly arise in the consideration of the demurrer, and that it was only treated in view of the fact that it would arise later in the consideration of another phase of the case. This question was raised and presented in the oral argument on the original hearing by counsel who appeared for the land board, and was in this manner urged upon the attention of the court. It now appears, however, that the case is to terminate, so far as this court is concerned, with our disposition of the present motion to modify the opinion. Counsel on both sides of the case now take the same position with reference to the state's title to these school sections. It follows, therefore, that what was said on the subject of the state's title to sections 16 and 36 would in the present status of the case amount to nothing more than dictum, and would determine or adjudicate nothing. Indeed, it was expressly recognized and stated in the original opinion that the construction of the grant of those lands is purely a federal question to be determined by the Interior Department, subject to review by the federal courts.

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In view of what we previously said it is perhaps proper to add here that it is clear to us, and has been admitted by the learned counsel on both sides, that in order to reach the conclusion that the state took no title under the admission bill (sec. 5) to sections 16 and 36, as construed by Secretary Hitchcock in *South Dakota v. Delicate*, 34 L. D. 717, and *South Dakota v. Riley*, 34 L. D. 657, it is necessary to eliminate the word "unsurveyed," and give to it absolutely no meaning or significance whatever. Whether the state has title or not, and whatever the character of that title may be, still it is apparently within the power of the government to prevent the state taking possession or acquiring any substantial benefits therefrom by withholding the public survey and thereby depriving the state of the evidence and means of proof of the identity of those sections. (*United States v. Montana Lumber & Mfg. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. ed. 604; *United States v. Birdseye*, 137 Fed. 516, 70 C. C. A. 100.) The government seems to have reserved the implied power to control the public surveys and consequently the means of identification of the thing granted.

No case has been brought to our attention wherein the federal supreme court has passed on the identical provisions of a grant by Congress such as are contained in our admission bill as they refer to sections 16 and 36 "whether surveyed or unsurveyed." The tendency of the supreme court, as disclosed by its decisions, has been to hold, whenever possible, that the grants by Congress of the public domain are still subject to the control of the government until after the survey has been made and approved. Counsel have furnished us a list of the authorities they claim tend to support their contention, most of which deal with floating grants to railroad companies. Some of these cases, however, deal with grants to states in some form or other. The following are the cases cited: *Leavenworth L. N. & G. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438; *Mo. K. & T. R. Co. v. Kan. Pac. R. Co.*, 97 U. S. 491, 24 L. ed. 1095; *St. P. & P. R. Co. v. N. P. Co.*, 139

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U. S. 1, 11 Sup. Ct. 389, 35 L. ed. 77; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. ed. 999; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. ed. 954; *Wisconsin v. Hitchcock*, 201 U. S. 202, 26 Sup. Ct. 498, 50 L. ed. 727; *Kissell v. St. Louis Public Schools*, 18 How. 19, 15 L. ed. 324; *West v. Cochran*, 17 How. 403, 15 L. ed. 110; *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338; *Rogers Locomotive M. Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. ed. 552; *Michigan L. & L. Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. ed. 591; *Clemmons v. Gillette*, 33 Mont. 321, 114 Am. St. 814, 83 Pac. 879; *Hibberd v. Slack*, 84 Fed. 571; *State of South Dakota v. Riley*, 34 L. D. 657.

The question as to when a school section has been "lost," so far as the state is concerned, is one to be determined by the government in every case where the state makes application for lieu lands to reimburse such "loss." If the government, therefore, holds that an unsurveyed school section, included in a forest reserve, or one which has been settled upon prior to survey, is thereby "lost" to the state, it is then the unmistakable duty of the department to grant the state "lieu" land for such "loss" (U. S. Comp. Stats. 1901, p. 1483; Idaho Admission Bill, sec. 4), and the power of the board to take title to lands in "lieu" of such loss as a base is beyond doubt.

The attorney general has stated in open court that the board acting under authority of the opinion as previously announced has refused to release the lands in question and is proceeding to perfect the state's title thereto, and that the board does not wish to file an answer to the complaint. A formal writ will, therefore, not issue. It is the judgment and decree of the court, however, that the state board of land commissioners has no power or authority to relinquish the lands described in the complaint.

Sullivan, C. J., and Stewart, J., concur.

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Points Decided.

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(May 20, 1910.)

THE DIAMOND BANK, Respondent, v. LU VAN METER  
et al., Appellants.

[108 Pac. 1042.]

## NOTICE OF APPEAL—ADVERSE PARTY.

(Syllabus by the court.)

1. Under the provisions of Rev. Codes, sec. 4808, an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney.

2. "Adverse party" as used in this section of the statute means every party who has an interest in conflict with the reversal of the judgment or whose rights might be adversely or injuriously affected by a reversal of such judgment, irrespective of whether such party be plaintiff, defendant or intervenor.

3. Where a joint judgment is rendered against two or more parties, and an appeal is taken by one of the parties against whom such joint judgment is rendered, then all other parties against whom such joint judgment has been rendered are adverse parties, and notice of appeal must be served upon each in order to give this court jurisdiction.

4. Where H. and C. execute a mortgage upon real property, and the property is afterward transferred to K., who assumes and agrees to pay such mortgage, and K. thereafter transfers said property to M., who assumes and agrees to pay such mortgage, in an action to foreclose such mortgage, all of said parties are made defendants, and a joint judgment is rendered against all, foreclosing said mortgage and directing a deficiency judgment to be entered, and M. appeals from such judgment, the appeal will be dismissed upon failure to serve the notices of appeal upon H., C., and K., notwithstanding the fact that judgment by default was entered against them.

APPEAL from the District Court of the Fourth Judicial District for Twin Falls County. Hon. Edward A. Walters, Judge.

Action to foreclose mortgage. Judgment for plaintiff. Defendant appeals. Appeal *dismissed*.

M. J. Sweeley, for Appellants, cites no authorities on point decided.

W. A. Babcock, and Stockslager & Bowen, for Respondent.

The respondent makes a motion to dismiss the appeal on the ground that the judgment is rendered against the appellant and the three other defendants, and that no notice of appeal was ever served upon the other defendants, and they do not join in the appeal.

"Adverse party," within the meaning of section 4808, has been defined by this court to be "every person whose interest in the subject matter of appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor." (*Jones v. Quantrell*, 2 Ida. 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Ida. 627, 23 Pac. 80; *Lydon v. Godard*, 5 Ida. 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Ida. 104, 53 Pac. 271; *Titiman v. Alamance Min. Co.*, 9 Ida. 240, 74 Pac. 529; *Nelson Bennett Co. v. Twin Falls L. & W. Co.*, 13 Ida. 767, 92 Pac. 980, 13 Ann. Cas. 17.)

A deficiency judgment is rendered against Holzman, Claar and Hart. Having sold the property on the assumption that the property would be sold to pay the mortgage debt, they are interested in the decree, and if this court should set aside the judgment as against Mrs. Van Meter, or deny the right to a sale under foreclosure, the personal judgment against them still exists. They are jointly liable with Mrs. Van Meter under the decree, and certainly would be prejudicially affected by any modification or reversal.

The record should show service of notice of appeal upon these defendants. (*Anderson v. Knott*, 1 Ida. 626; *Adams v. McPherson*, 3 Ida. 718, 34 Pac. 1095; *Tootle v. French*, 3 Ida. 1, 25 Pac. 1091.)

STEWART, J.—This is an action to foreclose a real estate mortgage. The complaint alleges that on July 1, 1906, at the

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city of Twin Falls, state of Idaho, R. H. Holtzman and John N. Claar made their certain promissory note dated on that date for the sum of \$2,800, payable to the order of Lon Warden on or before fifteen months after date; that to secure the payment of said note said Holtzman and Claar on July 2, 1906, executed and delivered to Warden a mortgage on certain real property situated in the then county of Cassia, now county of Twin Falls, state of Idaho; that such mortgage was acknowledged and recorded as provided by law in Cassia county, and afterward transcribed into the records of what is now Twin Falls county; that on August 13, 1906, and before the maturity of such note, for valuable consideration and in due course of business Warden sold, assigned, indorsed and delivered said note to the plaintiff; that at the time of the sale and assignment of such note the mortgage was also delivered to plaintiff, who is now alleged to be the legal owner and holder thereof; that on August 4, 1906, Holtzman and Claar sold and conveyed the mortgaged premises to Job K. Hart subject to said mortgage, and said Job K. Hart covenanted and agreed to assume and pay the said note and mortgage as part of the consideration and purchase price of said premises; that Job K. Hart and wife on May 28, 1907, sold and conveyed the mortgaged premises to Lu Van Meter, and the said Lu Van Meter covenanted and agreed, as part of the consideration for said conveyance and as part of the purchase price of said premises, to assume and pay said note and mortgage; that Baker A. Van Meter is the husband of Lu Van Meter.

Service was made upon the defendants and they all defaulted except the defendants, Lu Van Meter and husband, who filed an answer, which in substance admitted that the plaintiff was a foreign corporation, and denied that at the time the note was transferred to plaintiff and at the time this action was commenced it was not doing business in the state of Idaho, and denied that the plaintiff is in the state of Idaho for the sole purpose of bringing this action. The answer admits the conveyance of the mortgaged property as alleged and denies that either Hart or the defendant, Lu Van Meter, assumed or



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agreed to pay the mortgage. The answer then alleges payment of the mortgage by Lu Van Meter through process of garnishment. The cause was tried to the court and a decree rendered which, among other things, adjudges:

“It is hereby ordered, adjudged and decreed that the plaintiff, the Diamond Bank, a corporation organized and existing under the laws of the state of Missouri, do have and recover from the defendants, R. H. Holtzman, John N. Claar, Job K. Hart, and Lu Van Meter, the sum of \$1882.50, principal, interest and attorney’s fees, and costs of court. . . .

“It is ordered, adjudged and decreed, that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to plaintiff for the principal and interest, attorney’s fees and costs of this suit, and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by the sheriff of the county of Twin Falls in the manner prescribed by law and according to the course and practice of the court. . . . That the defendants and all persons claiming, or to claim, from or under them, and all persons having liens subsequent to said mortgage by judgment or decree upon the land described in said mortgage, and their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed. . . .

“And it is further ordered, adjudged and decreed, that if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with interest and costs, and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that on the coming in and filing of said return, the clerk of this court docket a judgment for such balance against the defendants,

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R. H. Holtzman, John N. Claar, Job K. Hart, and Lu Van Meter, and that the said defendants pay to the said plaintiff the amount of said deficiency and judgment with interest thereon at the rate of seven (7%) per cent per annum, from the date of last-mentioned return and judgment and that the plaintiff have execution therefor."

From this judgment the defendant, Lu Van Meter, appeals. The notice of appeal was served upon the plaintiff and was not served on the defendants, Holtzman, Claar or Hart. The respondents move to dismiss the appeal upon the ground that notice of appeal was not served upon the defendants, Holtzman, Claar and Hart, they being adverse parties. Rev. Codes, sec. 4808, provides: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney." If Holtzman, Claar or Hart were adverse parties to appellant, then this appeal must be dismissed. "Adverse parties," as used in this statute, has been variously defined. Such definitions, however, have been based apparently on the particular facts of each particular case.

In *Aulbach v. Dahler*, 4 Ida. 522, 43 Pac. 192, this court said: "Adverse parties on whom notice of appeal must be served are such parties as the reversal of judgment would affect." In *Titiman v. Alamance Min. Co.*, 9 Ida. 240, 74 Pac. 529, this court refers to *Aulbach v. Dahler* and said: "The term 'adverse party' as used in that section was construed by this court in *Aulbach v. Dahler*, *supra*, to mean every party whose interest in the subject matter would be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he is a plaintiff, defendant or intervenor." And the court cites *Jones v. Quantrell et al.*, 2 Ida. 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Ida. 627, 23 Pac. 80; *Lydon v. Godard*, 5 Ida. 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Ida. 104, 53 Pac. 271. The court then refers to the case of *Senter v. De Bernal*, 38 Cal. 637, as the leading case in California, construing a section

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of the California code identical with sec. 4808 of the Rev. Codes of this state, and quotes from that case as follows: "Every party whose interest in the subject matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an adverse party within the meaning of these provisions of the code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor."

In the *Titiman v. Alamance Min. Co.* opinion the court further refers to *Aulbach v. Dahler*, and says that it construes the term "adverse party," and holds that as separate judgments were entered against the defendants on whom the notice of appeal was not served, they could not be affected by a modification or reversal of the judgment entered against the appellant (defendant), and announces this to be the general rule announced in other Idaho cases passing upon this question. In the case of *Nelson Bennett Co. v. Twin Falls etc. Co.*, 13 Ida. 767, 92 Pac. 980, this court again reviews this question and says: "The statute intends that a notice of appeal should be served upon all parties who have an interest in conflict with a reversal of the judgment, or whose rights would be adversely affected by a reversal of such judgment." That is, if a reversal of the judgment could affect or change the liability of a party to the judgment upon a retrial of said cause to his injury, then such party is an adverse party and must be served with the notice of appeal.

In the case of *Doust v. R. M. Bell Tel. Co.*, 14 Ida. 677, 95 Pac. 209, this court again considered a motion to dismiss an appeal upon the alleged ground that adverse parties were not served, and the court said:

"The transcript shows that the Telephone Co. and said Crane were sued jointly and a joint judgment was rendered against them for over \$800. That being true, a reversal or modification of this judgment would adversely affect said Crane. He is therefore an adverse party. In order to give this court jurisdiction of the case on appeal, it is necessary that the transcript should show that the notice of appeal has

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been served on each and every of the adverse parties, and unless the record shows proper service of the notice of appeal, the appeal will be dismissed on motion. (*Anderson v. Knott*, 1 Ida. 626; *Tootle v. French*, 3 Ida. 1, 25 Pac. 1091; *Adams v. McPherson*, 3 Ida. 718, 34 Pac. 1095; *Moe v. Harger*, 10 Ida. 194, 77 Pac. 645.) This court has held in numerous cases that all parties against whom a joint judgment has been rendered are adverse parties, and that the notice of appeal must be served upon each of them in order to give this court jurisdiction. (*Jones v. Quantrell*, 2 Ida. 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Ida. 627, 23 Pac. 80; *Lydon v. Godard*, 5 Ida. 607, 51 Pac. 459; *Lewiston Nat. Bank v. Tefft*, 6 Ida. 104, 53 Pac. 271; *Titiman v. Alamance Min. Co.*, 9 Ida. 240, 74 Pac. 529; *Baker v. Drews*, 9 Ida. 276, 74 Pac. 1130; *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 13 Ida. 767, 92 Pac. 980 [13 Ann. Cas. 17].)''

The case of *Lewiston Nat. Bank v. Tefft*, 6 Ida. 104, 53 Pac. 271, is very similar in principal to the case now under consideration. That was an action to foreclose a mortgage executed by Albert P. Tefft and Carrie M. Tefft. A joint judgment was rendered against both of said defendants. From this judgment and decree Carrie M. Tefft appeals. Other parties were made defendants, some of whom appeared and others made default. Carrie M. Tefft and Mary E. Osborn, two of the defendants, appealed. A motion was made to dismiss the appeal on the ground that notice of appeal was not served upon Albert P. Tefft, against whom the joint judgment was rendered; and in the opinion in that case the court held that Albert P. Tefft was an adverse party and should have been served with the notice of appeal. On rehearing the court says:

"The petitioner claims that as Tefft has been released from all liability under the judgment of foreclosure, and the deficiency judgment against him had been satisfied, he was no longer interested in the appeal, was not an adverse party, and therefore entitled to service of the notice of appeal. The release of the defendant Tefft from all liability under the judgment of foreclosure as well as the deficiency judgment.

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was based upon the validity of the judgment. If, upon appeal, the judgment of foreclosure was reversed, set aside, or invalidated, the consideration for the release failed, and the plaintiff's right of action against Tefft was thereby revived, under the provisions of section 4498 of the Revised Statutes of Idaho. . . . The reversal or modification of the judgment upon appeal revived the liability of the defendant Tefft upon the original contract."

If a judgment is joint and is reversed, then the cause stands for retrial, and is in the same position as though never tried, and leaves all the parties to the suit in such position that they may urge as defenses any defense they may have. If, however, a judgment is several and grants relief against each defendant separately, then a reversal as to one defendant could not affect the judgment rendered against the other defendant. In the case at bar the judgment is joint and the same relief is granted against each of the defendants, that is, the court decrees the foreclosure and sale of the property mortgaged and directs that if sufficient is not realized from such sale to pay the judgment, then a judgment for such deficiency is directed to be entered against each of said defendants. If upon the appeal of Lu Van Meter the judgment should be reversed and upon retrial she should succeed in defeating the allegations of the complaint as to her assumption of and agreement to pay the mortgage, then of course even though the mortgage be foreclosed, a deficiency judgment could not be entered against her, and the deficiency judgment would then only stand against Holtzman, Claar and Hart, and in this respect certainly these three defendants would be adverse to the plaintiff upon this appeal and injuriously affected by such reversal. In other words, one of the issues presented by the pleadings as they now stand is whether Lu Van Meter assumed and agreed to pay the mortgage upon the property conveyed to her. Of course if she did assume and agree to pay such mortgage and the property mortgaged is insufficient to pay the judgment, and Hart pays such deficiency judgment, then under the decree as it now stands Van Meter would be liable to Hart for the amount thus paid;

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but if on reversal Van Meter should be successful upon this particular defense, then Hart could not recover from Van Meter the amount paid upon the deficiency, and to that extent would be affected, and injuriously so, by a reversal of such judgment.

Pursuing this inquiry further, if the appeal of Van Meter should be sustained and the cause reversed, upon a reversal Van Meter would be permitted to amend her answer and urge other defenses than those at present contained in her answer, and upon such defenses might succeed in defeating the foreclosure of the mortgage entirely and leave the makers of the note wholly responsible upon a personal judgment.

In the case of *Jaechel v. Pease*, 6 Ida. 131, 53 Pac. 399, this court held: "The first assignment of error cannot be sustained. Under our code if, in a suit to foreclose a mortgage, a foreclosure should be denied, the plaintiff is, nevertheless, entitled to judgment for the amount of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor." We think, therefore, there can be no question but that Holtzman, Claar and Hart are adverse parties to the appellant upon this appeal, under the provisions of Rev. Codes, sec. 4808, upon whom notice of appeal must be served. A safe rule to apply in determining whether a party to a judgment is adverse is, if the judgment be reversed and the cause again tried, could a judgment be entered which would injuriously affect the liability of such person by changing or increasing his liability or rights as fixed by the former judgment? If so, then such person is an adverse party within the meaning of the statute. Applying this rule to the facts of this case, it is apparent that Holtzman, Claar and Hart are adverse parties.

Counsel for appellant, however, contends that these parties defaulted, and because of such default they were not entitled to any notice of any proceedings in the action after such default has been entered. In support of this contention he cites Rev. Codes, sec. 4892, in part as follows:

"After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is

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required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned in the action for want of bail."

This section, however, does not modify or change the mandatory provisions of sec. 4808, *supra*, which requires that a notice of appeal shall be served on the adverse party or his attorney. The service of the notice of appeal is jurisdictional, and this court cannot acquire jurisdiction of an adverse party upon appeal, unless it appear that such party has been served with the notice of appeal. In the case of *Titiman v. Alamance Min. Co.*, *supra*, in referring to the case of *Aulbach v. Dahler*, 4 Ida. 522, 43 Pac. 192, this court said:

"The court in that case did not intend to, and did not, change the rule as laid down in any of the above-cited cases; while the latter part of the opinion in that case might be construed to mean that it was not necessary to serve the notice of appeal on a defaulting defendant, it was not intended to hold that it was not necessary to serve the notice of appeal on a defendant who would be affected by a modification or reversal of the judgment even though he be in default."

And in the case of *Nelson Bennett Co. v. Twin Falls etc. Co.*, *supra*, this court said: "Where default is entered and the rights of the defendant cannot be prejudicially affected by further proceedings in the case, he is not entitled to any notice of such further proceedings."

It is clear, therefore, that if a reversal of the judgment would adversely or injuriously affect a party to such judgment, whether such party was in default or appeared in the action, the statute requires such party to be served with notice of appeal. In this case Holtzman, Claar and Hart not having been served with the notice of appeal, and they being adverse parties, the appeal must be dismissed. Costs awarded to *respondent*.

Ailshie, J., concurs.

Sullivan, C. J., concurs in conclusion.

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Points Decided.

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(May 21, 1910.)

**GEORGE T. MILLER**, as Administrator With the Will Annexed of the Estate of **CARY A. CORYELL**, Deceased, **ELLA F. PHILLIPS**, **NORA B. McDOLÉ**, **ALICE E. DENBURGER**, and **HATTIE WAUGAMAN**, Appellants—**A. W. PHILLIPS**, Intervenor and Appellant, v. **WILLIAM F. KETTENBACH**, **FRANK W. KETTENBACH**, **LEWISTON NATIONAL BANK**, **IDAHO TRUST COMPANY**, **COLBY, CORYELL & HOWE LUMBER CO.**, **J. HOWARD HOWE**, **C. W. COLBY**, **LOUIS DIETHER**, **W. B. HAYWARDS**, **W. M. HAURY**, and **A. W. HAWKINS**, Respondents.

[109 Pac. 505.]

**ADMINISTRATOR—CLAIMS AGAINST ESTATE—LEGAL REMEDY AT LAW—EQUITABLE RELIEF—CONTRACT OF GUARANTY—LIABILITY OF DECEASED THEREON—CHARGES OF COLLUSION.**

(Syllabus by the court.)

1. An action in equity cannot be maintained to release the liability of an estate upon a contract of guaranty made by the decedent, when there exists a legal remedy at law, either affirmative or defensive, which would be adequate, certain and complete.

2. A court of equity will not decree the release of a guarantor upon the contract of guaranty unless special and peculiar circumstances are shown to exist which could not be shown as a defense in an action at law based upon such contract of guaranty.

3. Where C. signs a joint and several contract of guaranty guaranteeing the payment of promissory notes, and afterward dies, and an administrator is appointed, and the holder of such notes files the same as claims against the estate of C., and full opportunity is given to contest such claims upon any legal or equitable ground by the administrator, heirs or creditors of said estate, such administrator, heirs or creditors of said estate cannot afterward maintain an action in equity against the holder of said notes for the purpose of releasing said estate from its liability upon said contracts of guaranty, upon the ground that a conspiracy was entered into between the holder of such notes, the administrator of said estate and the stockholders of the principal debtor, whereby property belonging to the principal debtor was transferred to the holder of such notes at less than its actual and true value and



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the purchase price thereof improperly applied upon such indebtedness.

**'APPEAL** from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

An action to release an estate from its liability upon a contract of guaranty entered into by the decedent. *Affirmed.*

John O. Bender, for Appellants.

Only by a distinct suit brought in equity can all of these matters be tried and determined and can all of the necessary and proper parties be made parties to the action. The fact that these claims are characterized as a probate matter does not clothe this fraudulent transaction with the character of such probate matter. It is a distinct matter in itself, and must be brought in a separate suit where full and complete relief may be had.

James E. Babb, for Respondents.

Appellants claiming that the action is one to secure discharge from promissory notes, as guarantor of three thereof and as maker of another thereof, and the action being begun after all the notes were past due and while proceedings were pending which appellants were defending, and where appellants can make their defense, it results that they have no cause of action. (*County of Ada v. Bullen Bridge Co.*, 5 Ida. 188, 95 Am. St. 180, 47 Pac. 818, 36 L. R. A. 367; *Lewis v. Tobias*, 10 Cal. 578; *Smith v. Sparrow*, 13 Cal. 569; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Taylor v. Ford*, 92 Cal. 419, 28 Pac. 441.)

STEWART, J.—This is a most comprehensive case, comprehensive in extent of record, in the extent of the briefs and in the manifold questions presented upon the argument. Counsel for appellant opens the discussion of this case with the following statement:

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“This action is brought to release a guarantor from the payment of certain promissory notes, on the ground that the payee of said notes participated in the fraudulent conveyance of the principal debtor’s property.

“It is neither an action to set aside a conveyance, on the ground that it was made with intent to defraud creditors, nor an action to participate in the distribution of a fund with other creditors, on the ground that other particular creditors were preferred; and hence we do not attempt to presume that the plaintiff is a judgment creditor or a lienholder of the principal debtor, the Colby, Coryell & Howe Lumber Company, Ltd. (nor do we ask that the plaintiff, the estate of Cary A. Coryell, deceased, be allowed to participate in the distribution of the receipts of such conveyance with the other creditors), but we claim that the Lewiston National Bank, the payee of these promissory notes, is a party to this fraudulent transaction, and for that reason the estate of Cary A. Coryell, deceased is released from the contract of guaranty of the payment of said notes.”

This statement of the purpose of the action is repeated in different parts of the brief and especially reiterated in the reply brief, and we shall treat the questions from this standpoint. The object and purpose of this action, then, is to cancel and release the estate of Cary A. Coryell from liability upon a contract of guaranty, indorsed upon certain notes executed by the Colby, Coryell & Howe Lumber Co.

On December 29, 1905, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$10,000. Indorsed upon said note was the following guaranty: “For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. C. W. Colby, J. Howard Howe, C. A. Coryell.”

On March 30, 1906, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$10,000. Indorsed upon said note was the following guaranty: “For value received I hereby guarantee the payment of the within note and waive protest, demand and notice

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of nonpayment thereof. C. W. Colby, C. A. Coryell, J. Howard Howe, Lewis Diether."

On June 13, 1906, the lumber company executed a note payable on demand to the Lewiston National Bank in the sum of \$5,000. Indorsed upon said note was the following guaranty: "For value received I hereby guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof. J. Howard Howe, C. A. Coryell, Lewis Diether, C. W. Colby."

In this opinion we shall refer to the Colby, Coryell and Howe Lumber Company as the lumber company, to the estate of C. A. Coryell as the estate, and to the Lewiston National Bank as the bank.

On March 2, 1907, Cary A. Coryell died in Lewiston, Idaho, and on April 30, 1907, J. Howard Howe was appointed administrator. On November 16, 1907, the Lewiston National Bank presented to J. Howard Howe, as administrator, said three notes as claims against the estate of Cary A. Coryell. Before Howe resigned he allowed such claims and afterward upon protest of the heirs of the estate the allowance was set aside and the validity of such claims reached this court. Howe resigned as administrator April 30, 1908, and Geo. T. Miller was appointed as such administrator. Upon a reversal of said cause said claims finally passed to judgment as claims against the estate of Cary A. Coryell in the district court of Nez Perce county, on November 19, 1909, in which the district court rendered judgment in favor of the bank against the estate for the sum of \$38,865.58. An appeal was taken from that judgment to this court and this court has affirmed said judgment. (16 Ida. 201, 101 Pac. 723.)

The respondent contends that inasmuch as this is an action brought for the purpose of releasing the estate upon the contract of guaranty for the payment of the said notes and commenced after the maturity of such notes, and while proceedings were pending for the collection of said notes against the estate in the probate court, in which action full opportunity was given to appellants to make any defense they might have against the enforced payments of said notes,

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that this action cannot be maintained. If this position of respondent is correct, then it is unnecessary to consider or determine the manifold other questions presented by appellant.

This action was commenced March 26, 1909, long after the maturity of said notes and after said notes had been filed as claims against the estate, and after heirs of the estate had protested against their allowance.

In the case of *County of Ada v. Bullen Bridge Co.*, 5 Ida. 188, 95 Am. St. 180, 47 Pac. 818, 36 L. R. A. 367, in discussing the right to maintain an action in equity to cancel a written instrument, this court said:

“Where the invalidity of an instrument appears on its face, or where there is no danger of the instrument passing into the hands of an innocent holder, and where there is an adequate remedy at law, a court of equity will not take jurisdiction and decree the cancellation of such instrument. (Story’s Equity Jurisprudence, sec. 700a; *Atlantic Delaine Co. v. James*, 94 U. S. 214, [24 L. ed. 112].) In *Ada County v. Gess*, 4 Ida. 611, 43 Pac. 71 (which was an application for an injunction to restrain the payment of certain county warrants), the court holds that there was a complete and adequate remedy at law, and therefore equity could not be invoked. (See, also, *Morgan v. Board*, 4 Ida. 418, 39 Pac. 1118; *Rogers v. Hays*, 3 Ida. 597, 32 Pac. 259; *Clark v. Dayton*, 6 Neb. 192.)”

In that case the court comments upon and approves the decision in the case of *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. 965, as follows:

“That was a bill in equity praying for a perpetual injunction against the defendants, enjoining them from negotiating or delivering certain bonds issued by said corporation. It is there held that a court of equity, in a proper case, has full power to order the cancellation of bonds or other written instruments. But that it is a power which the court in its discretion will exercise with care, and only in accordance with what the court believes to be proper and right under the

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circumstances, and that such power will not be exercised where the *legal remedy*, either affirmative or defensive, would be adequate, certain and complete. To the same effect is *Atlantic Delaine Co. v. James*, 94 U. S. 207 [24 L. ed. 112], and *Town of Glastenbury v. McDonald*, 44 Vt. 450."

In *Ada County v. Bullen Bridge Co.*, *supra*, the court also quotes with approval from *Lewis v. Tobias*, 10 Cal. 578, as follows: "While if we recognize the principle invoked by the respondent, we must necessarily admit that in every case in which the payer of a note, or bond, or other money security has a defense to it, though purely legal, we must admit him, at his pleasure, into a court of equity, deny the holder a trial by jury, and permit the payer to take the place of the actor in a proceeding to test his liability. We see no necessity for such a principle, and we think it would produce only confusion, and that it starts with a denial of a positive right of the holder. If the holder unreasonably delays to sue, the payer may force him to do so under the statute." The case of *Lewis v. Tobias* is affirmed in *Smith v. Sparrow*, 13 Cal. 569, and in *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747.

The case of *Taylor v. Ford*, 92 Cal. 419, 28 Pac. 441, was an action under the statute to determine an adverse claim which the defendant asserted against the plaintiff by a promissory note. The defendant filed an answer and cross-complaint which was in form a complaint upon the note, and praying for judgment against the plaintiff for the amount due thereon. The plaintiff answered the cross-complaint setting up want of consideration and other defenses, and the court held that the issues thus joined were triable by a jury in the ordinary course of law; that the action was a common-law action upon a promissory note.

But counsel for appellant contends that the principle announced in these cases does not apply to the facts of this case. He contends, first, that the action is not to cancel a written instrument, and, second, that the rights and equities alleged in the complaint are of so peculiar and unusual character as to take the case out of the ordinary rule in such cases. The complaint filed by Geo. T. Miller, administrator,,

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is very lengthy, and after alleging the making of the notes, the death of Coryell, the appointment of the administrators, the organization of the lumber company and the names of the stockholders and their respective interests, it then alleges that the bank presented to J. Howard Howe, as administrator of the estate of Coryell, its claim based upon the promissory notes involved in this action, and that the administrator indorsed his allowance on said claims, and also the probate judge made the same allowance and thereafter vacated such allowance. Then follow the allegations with reference to the appeal taken to the district court, the hearing in the district court and the appeal to the supreme court; that on the 20th day of May, 1908, Miller, the administrator of the Coryell estate, brought an action against the lumber company and its stockholders, praying for an injunction against the disposition of the corporate property, and also asked for a receiver, the action in the district court upon the application for an injunction and the appointment of a receiver and the dismissal of such a lien. The complaint then alleges that on or about March 10, 1909, the defendants sold and conveyed all property belonging to the lumber company to the defendant, Will F. Kettenbach, for the sum of \$18,000; that no notice was given to the stockholders of the intention of the corporation to make such sale, or to its board of directors or to any other person, and that defendants conspired and confederated together to transfer the property to said Will F. Kettenbach to cheat and defraud the plaintiff and other stockholders and directors of said corporation, and that the bank is interested with Kettenbach in said conveyance and that said purchase was not made in good faith, and that the consideration of \$18,000 has not been paid and that the conveyance was made for the purpose of vesting all of said defendants with the ownership of said property, and that the purchase price will not pay twenty-five cents on the dollar of the indebtedness of the lumber company.

Afterward an amendment was offered and allowed to the complaint which alleged that the \$18,000 was given to Frank W. Kettenbach and Howe; that the lumber company was not

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a going concern and could not carry on business by reason of the sale, and that thereafter Frank W. Kettenbach and Will F. Kettenbach sold a portion of said property for about \$40,000 and still hold a portion of said property of the value of at least \$35,000; that thereafter Frank W. Kettenbach and J. Howard Howe sold and disposed of the remaining portion of said property of said company not sold to W. F. Kettenbach, and paid the receipts therefrom to said Idaho Trust Company; that said sales and each of them were made for the purpose of paying the receipts therefrom to said Frank W. Kettenbach, Howe and said banks.

The prayer of this complaint asks that the defendants be estopped from denying the allegations contained in the answer filed in the action for an injunction, and the appointment of a receiver and denying that the estate and property of the lumber company are of the value of \$156,440.97, and denying that Will F. and Frank W. Kettenbach, the Lewiston National Bank, the Idaho Trust Company, J. Howard Howe and A. Hawkins be held as trustees of said property and the value thereof for the creditors and stockholders of the corporation, and that they be directed to account for said property and be charged with said amount; that an order be made directing all creditors of the lumber company to appear and file their claims, and that such claims be determined and that defendants be directed to pay and discharge the same, and that the stockholders appear and show their respective share, and after the creditors have been paid, that the stockholders be paid the balance remaining of said fund.

Answers were filed by the defendants which put in issue the allegations of the complaint as to the fraudulent and collusive transfer alleged and the value of the property, and alleging that the property purchased was at its full value, and that Kettenbach paid therefor the sum of \$18,000, and in addition thereto paid and discharged other obligations and charges against said property and lumber company in the aggregate amount of \$55,000, and that the transfer was made in good faith on the authority of the board of directors with full notice.

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A complaint in intervention was also filed by A. W. Phillips, which alleged that he was a creditor of the Coryell estate, and then alleged substantially the same facts as are alleged in the complaint, and the prayer was that the notes involved in this case be satisfied and discharged, and for other equitable relief. The same counsel appeared for both the original plaintiff and the plaintiff in intervention.

The findings of the court are very lengthy and deal with many questions which were not in issue under the pleadings, and relate to matters which appeared in evidence; and the court in substance finds that the sale of the lumber company's property to William F. Kettenbach was fully authorized by the company, made in good faith, and that he paid therefor the aggregate of about \$52,000, which was the full market value of said property; that the sale was publicly noticed, full and fair opportunity given to anyone to bid at such sale; that such sale was not made collusively or for the purpose of defrauding either the creditors or stockholders of the company. And upon these findings the court entered judgment dismissing the complaint and complaint in intervention and giving respondents judgment for costs.

It is somewhat difficult to reconcile the allegations of the complaint and the complaint in intervention with the statement of counsel for plaintiff as to the nature and character of this action. From the allegations of the complaint and the complaint in intervention it would seem that the object and purpose of the action is to set aside the sale and transfer made by the board of directors of the lumber company of its property to Kettenbach, on the ground of fraud, inadequacy of purchase price, lack of notice of intention of the lumber company to sell. But counsel for appellant insist that the action was not brought and is not prosecuted for that purpose, no doubt making this contention by reason of the fact that it may be questioned whether the plaintiffs show such interest as would entitle them to maintain an action to set aside such transfer. Accepting appellant's contention as to the purpose of the action, we see no peculiar facts in this case which take it out of the ordinary rule of law as announced in the cases



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heretofore cited. We are unable to discover, and counsel have not pointed out, any reason why a defense might not have been interposed to such notes when filed as claims against the estate, based upon the ground that the estate was no longer liable upon said notes, and had been released from such liability by reason of the alleged fraudulent acts which are now made the basis of this action. When the bank filed the notes as claims against the estate of Coryell, the bank relied upon the contract of guaranty. If a state of facts existed which in law released the estate from liability, such facts could have been shown in the probate court in defense to the allowance of such claims. Under the statute of this state, equitable defenses may be plead as a defense in an action at law, and even if there were peculiar equitable considerations which it was necessary to plead as a defense to such notes, the same were permissible under our statute.

This question seems to be very fully covered by the provisions of Rev. Codes, secs. 5667 and 5668. By the former, "All issues of fact joined in the probate court must be tried in conformity with the requirements of chapter 2 of this title, in cases of contest of wills, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the probate court as in civil actions." By the latter section, "If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions." Where, therefore, issues are joined in the probate court, triable by a jury, and no demand is made that a jury be called, then such issues are tried by the court. If, however, a jury is demanded and the court is of the opinion that the

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issues are not sufficiently made, the court is directed to settle and frame the issues to be tried and submit the same with the evidence to the jury. There is no statutory reason which would prevent pleading an equitable defense in the probate court just the same as it may be plead in the district court; and if an equitable defense is plead in the probate court, it should be tried in the same manner as if plead in the district court, and when the statute extends to all heirs and creditors and all persons interested in the estate an opportunity to appear and contest claims filed against such estate, it thereby extends to such persons the right to plead as a defense to such claims any matter which will defeat or avoid such claims. Thus a remedy at law is provided, which in this case would have been adequate and sufficient to have entitled the appellants to plead as a defense against the allowance of the claims the facts which appellants now rely upon as entitling them to equitable relief in this action.

But counsel for appellant contends that such facts could not have been plead as a defense in the probate court because interests of other parties are involved, and there is no method by which such parties could have been brought into the probate court for the purpose of adjudicating their interests. An examination of the facts alleged, however, does not disclose that it would have been necessary to have brought into the probate court any additional parties in order to have determined whether the bank by its acts or conduct, and in collusion with other parties, had done acts or committed a wrong or fraud against the estate which in equity or law released the estate from its contract of guaranty as indorsed upon such notes. The only relief demanded in this case is against the bank; that is, that the estate be released from its contract of guaranty, and the only one who claimed any right under the contract of guaranty was the bank. Such could have been urged in the probate court as a defense to the allowance of such claims. And while it appears from the allegations that other parties aided the bank in the alleged fraudulent transaction, yet such parties were not necessary parties to the determination of the question whether the bank

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had entered into collusion with such persons for the purpose of fraudulently acquiring the property of the principal debtor, and thereby committed such wrongful acts as in equity or law would prevent it from enforcing the contract of guaranty.

We have disposed of this case upon the theory maintained by the appellant upon this appeal, and while there are a number of other questions which counsel has discussed in his brief, a consideration of such questions becomes of no consequence under the view we have taken of the nature of the action. If property belonging to the lumber company was disposed of fraudulently or not in accordance with law, and thereby the bank profited by such transaction and failed to give proper credit upon the notes involved in this case, such facts could and should have been presented as a defense when such notes were filed as claims against the estate.

The judgment is *affirmed*. Costs awarded to *respondents*.

Sullivan, C. J., concurs.

AILSHIE, J., Dissenting.—I do not think there is any good reason, either under the statute or the rules of practice and procedure, why the plaintiff cannot maintain this action, and I am therefore constrained to dissent from the views of the majority on this question.

In the first place, the plaintiff has no plain, speedy or adequate remedy at law, and if he is entitled to any relief whatever, it must be by reason of the application of the rules of equity to the particular facts of the case. He contends that the injury alleged has accrued by reason of the defendants conspiring and confederating together to defraud the estate represented by the plaintiff out of its share of the property owned by Colby, Coryell and Howe Lumber Co. The only method by which the plaintiff could secure any relief in this case in a court of law is by reason of the provisions of our constitution and statute abolishing all distinctions between actions at law and suits in equity. This change, however, does not abrogate the application of the principles of equity to the facts of any given case. The equitable prin-

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Opinion of the Court—Ailshie, J., Dissenting.

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ciple is still as applicable as if it were to be applied in a court of purely chancery jurisdiction.

As I understand the facts of this case as pleaded by the plaintiff and disclosed by the record, the cases of *Ada County v. Bullen Bridge Co.* and *Ada County v. Gess*, and the other cases cited from this court, are wholly inapplicable. In *Ada County v. Bullen Bridge Co.*, relief in equity was denied on the ground that the plaintiff had a plain, speedy and adequate remedy at law, either by affirmative action or as a defense to an action on the pretended obligation. *Ada County v. Gess*, and the other cases cited from this court, turned upon the same rule and principle. It will at once be seen that that principle is not applicable here. There is no known action at law whereby the plaintiff could obtain the relief sought by this present action. His cause of action appeals purely and solely to the equitable jurisdiction of the court. It is true that equitable defenses may be pleaded to actions at law, but it is not every case where an equitable defense can be pleaded that a failure to plead it is a bar to recovery in an independent suit in equity. The very facts of this case illustrate the unwisdom of attempting to apply the rule which seems to be announced by the court in this case. Here the fraudulent transactions alleged and from which the plaintiff seeks relief were consummated on the 10th day of March, 1909. On the other hand, these notes had been presented to the administrator on November 16, 1907. They had been allowed by the administrator, and subsequently on the application of certain of the heirs the allowance was vacated and set aside. As early as March 27, 1908, the heirs filed exceptions to the account of the administrator, which account included these specific notes, and the matter was continuously litigated in the probate court and the district court, and in this court until the 9th day of April, 1909, on which latter date this court affirmed the judgment of the district court, and held that the claims were still pending in the probate court for a hearing on the objections made by the heirs. According to the pleadings in the present case, the cause of action set forth had not accrued up to the date of appeal to

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Points Decided.

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this court prosecuted by the bank involving the allowance of this identical claim.

As no other question is considered in the majority opinion, I have not examined the record for the purpose of ascertaining whether the judgment should be affirmed or reversed on any of the other questions presented by the appellant. It is unnecessary and useless for me to enter into any consideration of any further questions, for the reason that the court has disposed of the case on the specific ground that the plaintiff cannot maintain this action.

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(May 23, 1910.)

FLYNN GROUP MINING CO., Appellant, v. FRANK MURPHY, Respondent.

[109 Pac. 851.]

**MINING CLAIMS — LOCATION OF — APPLICATION FOR PATENT — ADVERSE CLAIM — FINDINGS OF FACT — CONFLICTING EVIDENCE — NEWLY DISCOVERED EVIDENCE — EXCESSIVE LOCATIONS — INNOCENT ERROR — FRAUDULENT INTENTION — WHEN PRESUMED — REQUIREMENTS OF STATUTE — DISCOVERY POINT — EXTENT OF VEIN ON EACH SIDE OF — DEFECTIVE NOTICE — FIVE YEARS' POSSESSION.**

(Syllabus by the court.)

1. When there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal.
2. *Held*, that the court did not err in denying a new trial on the ground of newly discovered evidence.
3. A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location.
4. Where a discovery is made on a vein of mineral-bearing rock and the notice provides that such claim extends 700 feet in a north-westerly direction and 800 feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than 800 feet of such vein, subsequent

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Points Decided.

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locators may legally locate the excess of ground, as the first location is valid only to the extent of 800 feet southeasterly from the point of discovery on said claim.

5. The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim.

6. Where the boundaries of a claim are made excessive in size with fraudulent intent, it is void; or if so large as to preclude the presumption of innocent error, fraud will be presumed.

7. Under the provisions of sec. 3207, Rev. Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument.

8. *Held*, that where a location notice states that the mining claim which it describes extends 700 feet in a northwesterly direction and 800 feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point 800 feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that 800 feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the 800 feet.

9. The case of *Nicholls v. Lewis & Clark Mining Co.*, ante, p. 224, 109 Pac. 846, cited and approved, and the case of *Atkins v. Hendree*, 1 Ida. 95, cited and disapproved so far as it holds that no fraud can be perpetrated where there exists the means of ascertaining or discovering the fraud.

10. Under the provisions of sec. 3207, Rev. Codes, 1909, the location notice is not required to describe the exterior boundaries of the claim.

11. Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location of such claim to a subsequent locator, it is sufficient.

12. *Held*, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground.

13. *Held*, that the finding of the court to the effect that the respondent had performed the assessment work on the Murphy Fraction for nine years and that he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence.

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Argument for Appellant.

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APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. Wm. W. Woods, Judge.

An action brought in support of an adverse claim on application for a patent to a mining claim. Judgment for the defendant. *Affirmed.*

Franklin Pfirman, for Appellant.

The surface ground of a lode mining claim can only be of the length of 1,500 feet and width of 600 feet, but if the location exceeds that it is void only as to excess. (*Burke v. McDonald*, 2 Ida. 679, 33 Pac. 49, 13 Morr. Min. Rep. 325; 1 Lind. Mines, 2d ed., sec. 362; Snyder on Mines, 398; *Stemwinder Min. Co. v. Emma Min. Co.*, 2 Ida. 456, 21 Pac. 1040; *Jupiter Min. Co. v. Bodie Min. Co.*, 11 Fed. 666, 7 Saw. 96, 4 Morr. Min. Rep. 411; *English v. Johnson*, 17 Cal. 108, 76 Am. Dec. 574, 12 Morr. Min. Rep. 202; *Howeth v. Sullinger*, 113 Cal. 547, 45 Pac. 841; *Patterson v. Hitchcock*, 3 Colo. 533, 5 Morr. Min. Rep. 542; *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505, 18 Morr. Min. Rep. 534; *Hansen v. Fletcher*, 10 Utah, 266, 37 Pac. 480; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 435; *McElligott v. Krogh*, 151 Cal. 126, 90 Pac. 823.)

When a claim is excessive in length, the owner has the right to elect what portion he will relinquish as the excess, and cannot be required to surrender any particular portion by the location thereon of an overlapping claim by another. (*Zimmerman v. Funchion*, 161 Fed. 859; *Credo M. & S. Co. v. Highland M. & M. Co.*, 95 Fed. 911; *McIntosh v. Price*, 121 Fed. 716, 58 C. C. A. 136; *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 Pac. 1105, at page 1111; affirmed on this point expressly in *Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. ed. 273; *Gohres v. Illinois & J. Gravel M. Co.*, 40 Or. 516, 67 Pac. 666.)

The pretended location notice of the Murphy Fraction is so radically defective as to be void even under the most liberal rule.

Reasonable notice of the position of the claim is required to be shown in the location notice; such a description of the

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Opinion of the Court—Sullivan, C. J.

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locus of the claim that a person of ordinary intelligence would be enabled to find the claim from the directions contained in the notice, taken in connection with the boundaries of the claim on the ground. (*Bismark Mt. G. M. Co. v. North Sunbeam G. Co.*, 14 Ida. 516, 95 Pac. 14; *Morrison v. Regan*, 8 Ida. 291, 67 Pac. 955; *Ledoux v. Forester*, 94 Fed. 600; 1 Lindley, Mines, 2d ed., sec. 381.)

Gray & Knight, for Respondent.

Where a claim is excessive in area it is not void unless the excess is so great as to impress the locator with fraudulent intent. Any other locator may go to the point of discovery and measure the ground from the discovery notice and locate the excess. The location notice is required by the law as a notice to other prospectors and to the world of the extent of the locator's claim. (*Atkins v. Hendree*, 1 Ida. 100; *Stemwinder Min. Co. v. Emma Min. Co.*, 2 Ida. 462, 21 Pac. 1040; Lindley on Mines, sec. 362; Snyder on Mines, secs. 397, 398; Shamel, Mining Law, pp. 118, 119.)

There is no provision in the law requiring that the exterior boundaries of a mining claim should be described. The description of the ground located by reference to adjoining claims is sufficient. (*Morrison v. Regan*, 8 Ida. 291, 67 Pac. 955.)

SULLIVAN, C. J.—This is an action in support of an adverse claim under the provisions of U. S. Rev. Statutes, sec. 2326. It appears that in June, 1908, the respondent, Murphy, claiming to be the owner of the Murphy Fraction lode, situated in Lelande Mining District, Shoshone county, made application for a patent therefor in the United States land office at Coeur d'Alene, to which application the appellant, the Flynn Group Mining Co., which will hereafter be referred to as the mining company or the appellant, filed its adverse claim, and thereafter on October 6, 1908, commenced this action in support of said adverse claim.

The mining company's adverse claim was based on its alleged ownership of the Erin Fraction lode claim, which it is



alleged covered almost the identical ground included in the Murphy Fraction claim. The contention of the mining company is that the Murphy Fraction claim was not a valid location, for the reason that the ground included within its boundaries was at the time of its location included in other mining locations, to wit, the Snowdrift, the Buffalo and Parret Fractions.

The issues as made by the pleadings were tried by the court without a jury, and findings of fact and judgment were made and entered in favor of the respondent. Thereafter a motion for a new trial was denied, and this appeal is from the judgment and order denying the new trial.

The following, among other facts, appear from the record: On April 8, 1887, Francis Murphy, the respondent (whose name appears in the record sometimes as Francis and sometimes as Frank Murphy) and Andrew Short located the Snowdrift lode mining claim and in the location notice described said claim as "Commencing from discovery, running N. W. 700 feet, running S. E. 800 feet from discovery, bounded on N. W. by Black Bear and Cape Horn Lodes." In July, of 1899, one William P. Flynn, who owned two claims known as the Buffalo Fraction and Parret Fraction, situated in an easterly direction from the Snowdrift, had the same surveyed for a U. S. patent. It appears that the westerly end lines of those two claims were drawn in by the surveyor in an easterly direction, leaving some vacant ground between the Snowdrift on the easterly end and the Buffalo and Parret Fractions on the westerly ends; that Flynn had a number of mining claims on Flynn Mountain where said named claims were located, and informed a man by the name of Faulkner of the vacant ground and advised him that inasmuch as he had no mining ground, he had better locate it; that Flynn had lived upon that mountain for a great many years and knew the claims, their discoveries and corners; that he and Faulkner went to the discovery on the Snowdrift claim and measured off in a southeasterly direction 800 feet for the purpose of ascertaining how far in a southeasterly direction the Snowdrift ground extended. They

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thereupon made a discovery on said vacant ground and located the same by staking the ground and extending the stakes outside of the limits of the vacant ground in order that they might be sure to take in all of the ground there vacant. Said claim was located in the name of Frank Murphy as the Murphy Fraction and the location notice was filed for record on August 26, 1899. It appears that during each subsequent year Murphy has performed the assessment work and has constructed two tunnels upon that ground; that in June, 1906, Joseph F. Whelan, who was the secretary and general manager in full charge of said company's affairs, knew of the Murphy Fraction claim and the ground included within its boundaries, and knew that it was claimed by the respondent, and knew that Murphy had constructed two tunnels on said fraction; but on an examination by Whelan of the recorded location notice of the Murphy Fraction, he concluded that said notice was not sufficient, and proceeded to locate said ground by the Erin Fraction claim on behalf of said mining company. Murphy having ascertained that the original location notice of the Murphy Fraction was defective, made an amended location of said claim on November 13, 1906, and thereafter made application for a U. S. patent for said claim, and the mining company's adverse claim is based upon said Erin Fraction location.

The Erin Fraction lode was located long after the Murphy Fraction lode, and the title of the appellant to the ground in controversy depends upon the invalidity of the Murphy Fraction location. Appellant largely rests its case on the fact that the Murphy Fraction was an invalid location, for the reason that it was located on premises included within the Snowdrift claim. The Snowdrift claim was located in 1887; the Murphy Fraction on the 26th of August, 1899; the Erin Fraction on the 6th of June, 1906. Appellant contends that the Snowdrift claim was staked upon the ground and included within its exterior boundaries the discovery of the Murphy Fraction lode, and that said Murphy Fraction lode was therefore a void location. There was a conflict in the evidence upon this point, and the court expressly found that the dis-

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covery of the Murphy Fraction lode was not made within the exterior boundaries of the Snowdrift claim, but was made at a point easterly from the southeasterly end line of said claim.

There was some controversy over the exact location of the original northeast corner of the Snowdrift claim. There is a direct conflict in the testimony upon that question, and the trial court in its seventh finding of fact, among other things, found as follows: "That the northeast corner stake on the said Snowdrift claim was placed at a point from five to eight feet in a northeasterly direction from the present patent corner on the Snowdrift lode claim which is located at the same place as the northwest patent corner of the Murphy Fraction lode claim." The court having thus found upon conflicting evidence the location of that corner stake, this court upon all of the evidence on that point is not inclined to reverse that finding. However, on the motion for a new trial the appellant introduced the field-notes, plats and survey of the Buffalo and Parret Fraction lodes and the affidavit of Mr. Pfirman, which, it is contended, clearly establishes the fact that the court made an error in said finding and that said plat and field-notes show that Mr. Flynn testified falsely on the trial when he testified that said northeast corner of the Snowdrift lode was within five or eight feet of the corresponding corner as patented.

In opposition to said affidavit, the respondent filed the affidavit of Arthur A. Booth, deputy mineral surveyor, who surveyed said Buffalo and Parret Fractions for a patent in the month of July, 1899. From that affidavit it appears that said fractions were staked for patent and the patent corners established and the westerly end lines of the said claims were drawn in in an easterly direction, and that a large portion of the land now included in the Murphy Fraction lode was originally within the exterior boundaries of the Buffalo and Parrett Fraction lodes, and upon establishing the patent corners of said fractions, the land now included within the Murphy Fraction lode, or a large portion thereof, was left outside of said fraction lodes as established upon the ground by that survey; that in the patent plat of the survey for said

fractions and in the field-notes he reported the Snowdrift lode unsurveyed as lying west of the Buffalo and Parret Fraction lodes and so marked upon the patent plat; that he did so purely from hearsay, and he did not at that time survey to any of the corners of the Snowdrift lode and that he did not intend and did not show, either by his plat or field-notes, that the northeast corner of the Snowdrift was identical with corner No. 2 of the Buffalo Fraction lode; but referring specifically to his field-notes, he did report that corner No. 2 of the Buffalo Fraction lode was identical with corner No. 2 of the Josephine lode and corner No. 9 of the Exchequer, and that said field-notes and survey did not show, and did not pretend to show, any of the corners of the Snowdrift lode; that he simply marked the name of the Snowdrift lode unsurveyed on said plat, which he was told was situated in a westerly direction.

We have carefully considered the plats and affidavits used on motion for a new trial and are satisfied that the court came to the right conclusion in regard to the location of the northeast corner of said Snowdrift lode claim, and did not err in denying a new trial on the ground of newly discovered evidence.

It appears from the evidence of the locators of the Murphy Fraction lode that when they went to locate it they went to the discovery shaft or point on the Snowdrift lode and measured off in a southeasterly direction 800 feet from that point, that being the length upon the lode in that direction called for by the location notice, and then located the Murphy Fraction easterly of and adjoining said Snowdrift location. But it is contended by appellant that the easterly end line of said Snowdrift claim as marked upon the ground extended more than 800 feet easterly from said point of discovery, and for that reason was included in said claim and was not open to location at the time of the location of said Murphy Fraction lode; that if said Snowdrift location included more ground than the locators were entitled to, the ground included within the stakes had been segregated from the public domain and

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was not subject to location until the locators adjusted the exterior lines thereof and excluded therefrom any surplus ground contained therein, and cites in support of that contention, *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, and quotes the following from said decision:

“Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done.”

We fully recognize the rule laid down by the supreme court of the United States in that decision, but we do not think that rule applies to the facts of this case. The location notice of the Snowdrift claim provides that the lode claim extends from the point of discovery 700 feet in a northwesterly direction and 800 feet in a southeasterly direction. If the parties who located it in fact placed their stakes at the northeasterly and southeasterly corners of said claims so as to take in more ground than called for in the notice, such excess was not and could not be legally included in that location. It is not left to the pleasure of the locator to adjust his boundaries when and where he likes within an excessive location when it will interfere with a subsequent locator.

Counsel for appellant contends that a locator may cover or include within his location an excessive area of ground and hold it against the world until he gets ready to conform it to the area allowed by the mining laws or until he has the same surveyed for a patent. We recognize the rule that where a claim is excessive in area, the location is not void unless the excess is so great as to impress the locator with a fraudulent intent. The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the ground the limits and boundaries of the claim may be readily ascertained, and so definite and certain as to prevent the changing or floating of the claim. This court held in *Burke v. McDonald*, 2 Ida. 679, 33 Pac. 49, 17 Morr. Min. Rep. 325,

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that where the boundary of a claim is made excessive in size with fraudulent intent, it is void; or if so large as to preclude innocent error, fraud will be presumed. (*Stemwinder Min. Co. v. Emma & L. C. Con. Co.*, 2 Ida. 456, 21 Pac. 1040.)

Among other things, it is provided in sec. 3207 of the Rev. Codes of 1909, as follows:

“The locator at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument, marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim; and seventh, the name of the mining district, county and state.”

The provisions of said section require a monument of some kind to be erected at the point of discovery, which point is supposed to be on the ledge, and require the locator to place on such monument “the distance claimed along the vein each way from said monument,” and also require the location notice to state the direction and distance claimed along the ledge from the discovery. In the location notice of said Snowdrift lode it is stated that said claim extends in a north-westerly direction along the lode 700 feet, and in a south-easterly direction along the lode 800 feet. That notice fixes the distance along the lode that said claim extends from the point of discovery. The ground beyond the 800 feet south-

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easterly from the discovery was not included in said claim, even though the stakes marking the northeasterly and southeasterly corners of said claim were placed beyond the 800 feet. Any locator had a right to go to the point of discovery of the Snowdrift claim and measure the ground from the discovery point 800 feet in a southeasterly direction along the lode, and if there was any unlocated ground beyond the 800 feet, locate it, regardless of the fact that the easterly end stakes had been established beyond the 800 feet.

In *Nicholls et al. v. Lewis & Clark Mining Co.*, ante, p. 224, 109 Pac. 846, just decided by this court, the court had occasion to review and disapprove of certain language used by Chief Justice McBride in *Atkins v. Hendree*, 1 Ida. 95, to wit: "To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it," and held that where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with fraudulent intent to hold the entire area under one location, such location is void. Or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. Chief Justice McBride virtually holds in the case of *Atkins v. Hendree*, supra, that no fraud can be perpetrated where there exists the same means of ascertaining or discovering the fraud that the other parties had to commit it. We cannot assent to that doctrine, for, as we view it, a fraudulent act still remains fraudulent even though there exists very plain and simple means of ascertaining or discovering the fraud. Where a claim is located in good faith and contains some excess of ground, the location is valid except as to the excess, and others who may desire to make a location may measure the ground and confine the first locator to the limits prescribed by law. This court therefore holds that a subsequent locator may measure the ground of a prior location from the discovery and ascertain the extent of such location, and if it contains

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more ground within its boundaries than is described in the location notice, and more land than can be located under one location, the subsequent locator may locate the excess and maintain his right thereto. This rule applies to locations not fraudulent on account of containing an unreasonable excess of ground, and it has no application to fraudulent locations such as in the case of *Nicholls v. Lewis & Clark Mining Co.*, for if the location is absolutely void, the ground included therein has not been segregated thereby from the public domain. There is no contention made in the case at bar that the excess in the Snowdrift location, if there was any, was the result of fraudulent intent, but we think it is conceded that such excess, if there was any, was the result of innocent error.

It is contended that the location notice of the Murphy Fraction is so defective as to impart no notice whatever. It must be admitted that it does not describe the exterior boundaries of said mining claim. It does, however, contain the seven requisites of a location notice as provided by said sec. 3207, Rev. Codes. It contains (1) the name of the locator; (2) the name of the claim; (3) the date of the discovery; (4) the distance along the ledge from the discovery; (5) the distance claimed on each side of the ledge; (6) such a description as will fix and describe the location of the claim; (7) the name of the mining district, county and state. The locator attempted to describe the exterior boundaries of the claim and utterly failed to do so. The law, however, does not require the notice to describe the exterior boundaries of the claim. It is recited in the notice that the adjoining claims are the Snowdrift on the west and the Buffalo Fraction and the Parret Fraction on the east, and the evidence shows that those claims were well-known claims at the time of the location of the Murphy Fraction.

This court held in *Morrison v. Regan*, 8 Ida. 291, 67 Pac. 955, that where it appears a mining claim has been located in good faith, if by any reasonable construction the language used in the notice describing the claim and in reference to natural objects and permanent monuments will impart knowledge of the location of the claim to a subsequent locator, it is



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sufficient. It has frequently been held that reference to well-known mining claims is a sufficient compliance with the law (sec. 2324, Rev. Stat. of the U. S., and sec. 3207, Rev. Codes, 1909) requiring mining locations to be tied to some natural object or permanent monument so as to identify the claim. (*Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. ed. 964; *Duncan v. Fulton*, 15 Colo. App. 140, 61 Pac. 244; *Kinney v. Fleming*, 6 Ariz. 263, 56 Pac. 723.)

In *Hammer v. Milling Co.*, *supra*, the location notice stated as follows: "This lode located about 1,500 feet south of Vaughan's Little Jenny mine." The supreme court of Montana held that that was a sufficient reference to a natural object or permanent monument, and the supreme court of the United States, sustaining that decision, said: "We agree with the court below that the Little Jenny mine will be presumed to be a well-known object or permanent monument until the contrary appears."

In *Bismark Mining Co. v. North Sunbeam Co.*, 14 Ida. 516, 95 Pac. 14, this court stated as follows: "It is the well-settled doctrine of all of the later decisions that location notices and records should receive a liberal construction, to the end of upholding a location made in good faith"; and quotes from the case of *Londonderry M. Co. v. United G. M. Co.*, 38 Colo. 480, 88 Pac. 455, as follows:

"Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and if by reasonable construction the language descriptive of the situs of a claim, aided or unaided by testimony *aliunde*, will do so, it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law."

It appears from the evidence that said Murphy Fraction was staked, and with the exception of one stake, they remained standing up to the time the survey was made for patent. It seems that one of the stakes had fallen down and was not up

during the year prior to its survey for a patent. After reciting certain facts in *Bismark Mining Co. v. North Sunbeam Co.*, *supra*, this court said:

“Those facts appearing, every reasonable presumption that can be drawn therefrom should be in favor of his knowing of said locations; and his grantees should not be permitted to take advantage of any minor defects in the location notices of said mining claims. If Oster had actual notice of the location and boundaries of said claims, neither he nor his grantees will be permitted to take advantage of some technical defect in the location notice, where it appears that said claims were located in good faith.”

We think the notice in this case is sufficient under the facts of the case, as it clearly appears that Whelan, who located the Erin Fraction claim for appellant, had full knowledge of the location of the Murphy Fraction claim, and one of the principal reasons that he gives for locating it is that on an examination of the location notice he concluded it was defective. Whelan had actual notice that the ground had been located, also constructive notice by an examination of the recorded notice, and had seen the work done by Murphy on the claim for six or seven years. It is true that Whelan also claimed that the ground was not subject to location at the time Murphy located it as the Murphy Fraction, for the reason that the ground was covered by other locations, but the trial court found against this contention. Whelan testified that after examining the notice, he concluded it was not sufficient.

The court found that the respondent had performed the assessment work on the Murphy Fraction claim for nine years beginning with 1900 and ending with 1908, and that respondent had held, worked and was in the possession of the Murphy Fraction lode for more than five years from and after the 26th of August, 1899, the date of its location, and that during said period of time, and for more than five years after the date of said location, there was no adverse claim made to said premises or to any part thereof, and that such possession was open, notorious, exclusive and continuous for more than six years. We think that finding is supported by the evidence.

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Under the facts and circumstances of this case, to permit the appellant to recover on purely technical grounds would be doing a great injustice to the respondent.

Counsel for appellant contends that the evidence is not sufficient to support the findings to the effect that respondent has been in open, notorious and adverse possession of said claim for a period of more than six years. On an examination of the evidence, we are fully satisfied that that finding is amply supported by the evidence.

The argument contained in appellant's brief is predicated upon four propositions: (1) That the Murphy Fraction lode was located within the lines of the Snowdrift lode; (2) that the notice of location filed for record was void; (3) that there was no adverse possession of said Murphy lode; (4) that after the abandonment of the easterly portion of the Snowdrift location, the Erin Fraction was located so as to cover such abandoned portion, and was therefore a valid location. All of the assignments of error are practically included within those contentions, and the trial court found in favor of respondent on each and every one of them, and such findings are based on a substantial conflict in the evidence.

Upon a careful review of the whole record, we are fully satisfied that the findings of fact are supported by the evidence and that the judgment must be affirmed, and it is so ordered. Costs are awarded to the respondent.

Stewart and Ailshie, JJ., concur.

ON PETITION FOR REHEARING.

(June 22, 1910.)

SULLIVAN, C. J.—A petition for rehearing has been filed in this matter, whereby it is contended that the rule laid down in this case is in conflict with the rule laid down in the case of *Nicholls v. Lewis & Clark Min. Co.*, ante, p. 224, 109 Pac. 846, decided at this term.

After a careful examination of both opinions, we are unable to find any conflict between the rules laid down therein.

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Counsel for appellant also contends that the rule laid down in subdivisions 4, 7 and 8 of the syllabus is not the rule that should obtain in this state, and if it is the established rule, it will lead to many conflicts and disturbances among mineral claimants, and that it would be unjust to require a locator of a mining claim, when informed by another mineral claimant that his claim is excessive, to then and there relinquish the excess; that such a rule would be unfair to the excessive claimant. Counsel thus contends, in effect, that it should be left to the discretion of the one who claims an excessive area of surface ground in his mining claim when he should relinquish the excess.

We cannot agree with that contention. Under the law, a locator should not be permitted to hold an excess of ground with a single location, and when his notice provides that his mining claim extends a certain number of feet in a certain direction from the discovery, subsequent locators may be governed by the statement in the notice and not by stakes that include within their boundary an excess of surface ground. We are not inclined to depart from the rule laid down in the opinion in this case.

Our attention has been called to the fact that the Snow-drift claim was located under the provisions of secs. 3101 and 3102, Rev. Statutes, instead of under the provisions of sec. 3207, Rev. Codes, and under the provisions of said sec. 3101, the notice of location was required to be conspicuously attached to one of the center end stakes instead of being posted at the place of discovery; but that would make no difference so far as the rule laid down in this opinion goes. It was, in fact, posted at the discovery and not on the center end stake, and recited that the claim extended 700 feet in a northwesterly direction from the notice and discovery, and 800 feet in a southeasterly direction therefrom, and under that notice he was only entitled to 800 feet in a southeasterly direction from the discovery point.

Some question is raised in regard to newly discovered evidence and the admission of counter-affidavits. The newly discovered evidence consisted of field-notes, plat and surveys

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Points Decided.

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of the Buffalo and Parret Fraction lodes. Upon an examination of those, we are fully satisfied that the decision of this court would not have been different from what it now is had that evidence been introduced on the trial. We do not think, as contended by counsel, that this newly discovered evidence, had it been introduced on the trial, would have entitled appellant to recover in this action.

No sufficient reason appearing why a rehearing should be granted, the application is denied.

Ailshie, J., concurs.

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(May 25, 1910.)

REILLY ATKINSON, Plaintiff, v. BOARD OF COMMISSIONERS OF ADA COUNTY, Defendant.

[108 Pac. 1046.]

CONSTITUTIONAL LAW—RAILROAD DISTRICTS—INHIBITION OF THE CONSTITUTION.

(Syllabus by the court.)

1. The act of the legislature approved March 16, 1909 (Sess. Laws 1909, p. 238), providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts and providing for operating or leasing the same, is in violation of the provisions of sec. 4 of art. 8 of the state constitution and contrary to the spirit of secs. 2 and 3 of art. 8 and sec. 4 of art. 12 of the constitution.

2. That which the constitution directly prohibits may not be done by indirection or by a general legislative act which is meant and intended to include and accomplish the purposes and objects specifically or impliedly prohibited.

3. It was never anticipated or intended by the framers of the constitution that counties, or other political subdivisions, would or could enter into the business of railroad building, but, on the contrary, the specific prohibitions found in the constitution manifest a clear purpose and intent to prohibit the state or county, or any subdivision thereof, from entering into any such enterprise.

4. The building of a railroad is not within itself an exercise of governmental power, but is purely a business enterprise, and if it is to be engaged in by the state or any of its political subdivisions,

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Argument for Defendant.

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it must be done by virtue of the proprietary powers of the state or political subdivisions thereof and not under the police or general welfare powers of the state.

Original action for a writ of mandate. Demurrer to the complaint sustained and action dismissed.

Karl Paine, and B. S. Crow, for Plaintiff.

In the cases contemplated by the constitution, the state or municipality would not become the absolute owner of the railroad, with power to manage, operate and control the same, or the owner of an interest therein; hence if these provisions were applicable to districts other than political subdivisions of the state, and we submit they are not, they would not prevent such districts from constructing railroads that were to become their own property. (*City of Cincinnati v. Dexter*, 55 Ohio St. 93, 44 N. E. 520.)

We do not discuss the wisdom of this legislation, for, as we understand it, the court is not concerned with the wisdom or folly, as the case may be, of the statute. (*State v. Dolan*, 13 Ida. 693, 92 Pac. 995, 14 L. R. A., N. S., 1259.)

D. G. McDougall, C. P. McCarthy, J. H. Peterson, and O. M. Van Duyn, for Defendant Board.

In passing upon the question of whether or not this law is an evasion of our constitution, the court is entitled to read between the lines of this bill and form its conclusion as to just what the results of such legislation will be. Of what use or benefit to our community would be a railroad between Boise and Highland without connection with trunk lines? Such a line of railroad would be absolutely at the mercy of the trunk line, and in time would become a part of such trunk line. If we then look at the railroad at a time when it has passed into the hands of a railroad corporation, can we truthfully say that from the inception of such railroad the public has not loaned its credit thereto? (*Taylor v. Ross County Commrs.*, 23 Ohio St. 22.)

It is a fair inference that the object of this legislation was, and its operation will be, to enable the political organ-

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izations and municipalities of the state to do indirectly what they are prohibited from doing directly; that the main object of this legislation will be to enable municipalities of the state to use their credit, and raise and expend their money in aid of railroad companies. (*Counterman v. Dublin Township*, 38 Ohio St. 515; *Wyscaver v. Atkinson*, 37 Ohio St. 80.)

In these cases the court looked behind the language of the bill and went into its utility, operation and purpose, and found that while, strictly speaking, the public credit was not *loaned*, at the same time the utility, operation and purpose of the law would bring about exactly the same results, and that it was not in the contemplation of the framers of the constitution that an evasion so palpable as this could be indulged in.

AILSHIE, J.—This is an original action commenced in this court praying for the issuance of a writ of mandate against the commissioners of Ada county, requiring and compelling them to make an order calling an election for the purpose of voting on the formation of a railroad district in the manner authorized and provided for by the act of March 16, 1909 (Sess. Laws 1909, p. 238). The real question involved in this proceeding is the constitutionality of this statute. The act is intended to authorize the formation of railroad districts by a vote of the resident land owners of the districts. It provides for the manner of organizing the district, the election of directors, the voting of bonds, the selection and acquiring rights of way, and the building and constructing of lines of railroad and operating or leasing the same. The act appears to have been very carefully drawn, and conforms very closely to the provisions of the irrigation district laws of this state, providing substantially the same method of formation of the district, of levying and collecting assessments, determining benefits, and other incidents and details of the irrigation act.

Sections 2, 3, and 4 of art. 8 of the state constitution read as follows:

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Sec. 2: "The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation."

Sec. 3: "No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

Sec. 4: "No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or incorporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state."

Section 2 prohibits the state in any manner ever becoming interested with any individual, association or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; while sec. 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district, or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid



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Opinion of the Court—Ailshie, J.

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of any individual, association or corporation. Sec. 4 of art. 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in sec. 4 of art 8. Sec. 4 of art. 12, however, specifically authorizes cities and towns to contract indebtedness for "school, water, sanitary and illuminating purposes," thereby excluding all other purposes not governmental in their character.

It is argued by the plaintiff in this case that under the authority of *Nampa etc. Irr. Dist. v. Brose*, 11 Ida. 474, 83 Pac. 499, holding the district irrigation law of this state valid and constitutional, that it must necessarily and logically follow that the present act authorizing railroad districts is also constitutional. The foregoing case is clearly not decisive of the question now before the court. There is a wide difference between the subject of and necessity for irrigation in this state and railroad building. Water when secured becomes appurtenant to land, and in vast sections of this state it is absolutely essential to life and habitation that it be secured by means of canals and ditches. When water is conveyed to a tract of land, it is unnecessary that it be carried further in order to be useful or marketable. It needs nothing further than application to the soil. It has in fact already become attached to and the chief value of the land and will be fully as useful if not another acre be watered as if thousands adjoining be watered. But a railroad is an entirely different utility. A railroad from one man's farm to another would be of no use, nor would it in many cases be of any use from one side of a county or district to the other. It is a medium of transportation and commerce, and in order to be of any use or value whatever must tap centers of population, production and manufacture. A railroad in order to be of use or value must extend from some place to somewhere. The act in question authorizes the building of "railroads," but the result under the act must necessarily be that a district can only build a part of a road,—a branch line or feeder to a main or trunk line. As a court, we cannot be ignorant of that which is common knowledge. With the wisdom of legislation

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we have nothing to do, but it is our duty to look to the results an act will and is intended to accomplish and determine whether those results will be violative of the constitution. If each community is to be authorized to form a district and bond itself to build a stub or branch line to connect with the main transcontinental trunk lines, will they not be absolutely at the mercy of the trunk line? And will it not result in the district building the branch line for the *use of or donation* in whole or in part to the main line, and thereby doing *indirectly* the very thing sec. 4 of art. 8 of the constitution forbids and prohibits? No one anticipates or expects that a district as authorized by this act either can or will operate a line of railroad extending through or across such district only. It is to all purposes and intents an inducement or subsidy to a main or through line. If it is constitutional to build such a line of road by a district, it would be constitutional to authorize its sale and thereby "indirectly . . . aid . . . a corporation" in violation of the constitution.

In *Wysever v. Atkinson*, 37 Ohio St. 80, the supreme court of Ohio had under consideration an act passed by the legislature in 1880 "to authorize certain townships to build railroads and to lease or operate the same." That act provided that townships falling within a certain class might vote bonds and construct a line of railroad and do the things necessary and incident thereto. The court held the act to be in violation of sec. 6, of art. 8 of the constitution of Ohio, which reads as follows: "The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for, or loan its credit to, or in aid of any such company, corporation or association." In considering this question, the supreme court said:

"Was it contemplated that a complete and independent railroad should be constructed by the township? We think not, and therefore, without speculating as to the manner in which it was intended that the result should be accomplished,

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Opinion of the Court—Ailshie, J.

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it is quite evident, to our minds, that the legislative intent, as well as that of the trustees of the township, was that the proposed road should in some manner and by some means become consolidated or connected with other roads, as part of a more extended line of railway, in order to make it at all subservient to the public welfare, and that in no other way could it be made of public utility.

“The purpose and effect of the statute is to unite the means and credit of the township with those of other parties in order to promote a common enterprise, to wit: the construction of a continuous line of railway, which could not be accomplished without such combination of interests.”

The court quoted with approval from the opinion in *Walker v. Cincinnati*, 21 Ohio St. 54, 8 Am. Rep. 24, as follows: “The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals or private corporations or associations. *It forbids the union of public and private capital or credit in any enterprise whatever.* In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of parties interested therein. Though joint-stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from several persons associated together.”

The learned justice who wrote the opinion in *Wyscaver v. Atkinson*, after quoting the above extract from *Walker v. Cincinnati*, added the further comment: “And I will add, that it makes no difference whether the scheme for the union of public and private money or credit originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any

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Opinion of the Court—Ailshie, J.

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county, city, town or township with the capital of any other person, whether incorporated or unincorporated, for the purpose of promoting any enterprise whatever.”

In *McDonald v. Doust*, 11 Ida. 24, 81 Pac. 63, 69 L. R. A. 220, this court said: “Acts inconsistent with the spirit of the constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein.” This position is reinforced by the further fact that railroad building is not within itself an exercise of governmental power, but is purely a business enterprise and must be justified, if at all, under the proprietary powers of the state or political subdivision. Previous action of the legislature and the people with reference to this provision of our constitution is a pertinent and proper subject of inquiry. In March, 1905, the legislature by joint resolution submitted to the people a proposition to so amend sec. 4, art. 8, of the constitution as to authorize a “county, city, village, municipality or other subdivision of the state” by vote of the people to “make donations to any railroad or other works of internal improvement” to an amount not exceeding ten per cent of the assessed valuation of such county. That amendment was defeated by an overwhelming vote of the people. In this respect we have a positive declaration from the people against any participation by the counties or any of their subdivisions in railroad building in and of “any individual, association or corporation.”

It is said that this provision does not prohibit the county or other subdivision building and owning a road in its entirety. It is true that the prohibition against absolute ownership is not, in so many words, to be found in the constitution, but it is clear from the context and the language employed in secs. 2, 3 and 4, art. 8, and sec. 4, art. 12, that it was never contemplated that the counties or other political subdivisions would or could go into railroad building, and so the framers of the constitution forbade donations or ownership in part. They evidently appreciated the fact that a railroad to be of any value to the people of Idaho must extend further than across a county or even across the state,—that it must reach

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Points Decided.

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the markets, not merely at one end of the line but at both ends. If the people want to authorize the formation of railroad districts, they can readily do so by adopting an amendment to the constitution, but until they do so we are constrained to hold such acts in conflict with the constitution.

The act in question is, in our opinion, violative of the spirit and intent of the constitution (secs. 2, 3, and 4, art. 8, and sec. 4, art. 12), and cannot be upheld.

The demurrer to the complaint is sustained, and the action will be dismissed. No costs awarded.

Sullivan, C. J., and Stewart, J., concur.

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(May 27, 1910.)

EDWARD SHAINWALD, Appellant, v. FIRST NATIONAL BANK OF WEISER, Respondent.

[109 Pac. 257.]

TAXATION OF BANK STOCK—PAYMENT OF TAX BY BANK—LIEN OF BANK FOR REIMBURSEMENT.

(Syllabus by the court.)

1. Under the statute of this state (sec. 1672, Rev. Codes) the shares of stock in banks must be assessed against the owners of such stock and the tax thereon must be paid by the bank. The liability on the part of the bank under this statute to pay the taxes assessed against the stock carries with it an implied lien in favor of the bank and against the stock and the earnings, dividends and profits derived therefrom for reimbursement in the sum so paid.

2. The claim and demand of a bank for reimbursement for moneys paid as taxes on the shares of stock held by its shareholders follows and attaches to the stock and its earnings, profits and dividends, irrespective of any sale or transfer which may be made of such stock.

3. Where S. sold his shares of stock in a national bank subsequent to the date on which taxes attach for the year and prior to the payment of such taxes by the bank, the bank cannot thereafter

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Argument for Appellant.

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pay over the earnings and dividends from the stock to the purchaser of such stock and then maintain a personal action against the vendor of the stock for recovery of the taxes so paid subsequent to the sale and transfer of the stock.

4. Where a bank pays the taxes against the shares of stock owned by its stockholders, it cannot lawfully charge the same up against the aggregate earnings of the bank as current expense or otherwise, but must charge the amount paid against the shares of stock on which such payment was made or against the present owner of such stock.

APPEAL from the District Court of the Seventh Judicial District, for the County of Washington. Hon. Ed. L. Bryan, Judge.

Action to recover from a stockholder taxes paid by the bank subsequent to the sale of such stock by the stockholder. Judgment for the plaintiff and defendant appealed. *Reversed*.

Ed. R. Coulter, for Appellant.

The gist of sec. 1672, Rev. Codes, is that the stock must be assessed in the name of the stockholders, the bank must furnish the assessor with a list of its stockholders and the number of shares held by each, and the bank must pay the tax. The law is silent as to how the bank and its stockholders fix up the matter between them. The law does not care so long as it is equitably adjusted. (*First National Bank v. Kentucky*, 9 Wall. (U. S.) 353, 19 L. ed. 701.)

These statutes (and nearly every state in the Union has the same mode of collecting taxes on bank stock) were drawn on the theory that the bank has dividends and property belonging to the stock out of which it can reimburse itself for the taxes paid on the shares. (2 Cooley on Taxation; 3d ed., p. 832; *Stapylton v. Thaggard*, 91 Fed. 93, 33 C. C. A. 353; *Knoxville Traction Co. v. McMillan*, 111 Tenn. 521, 77 S. W. 665, 65 L. R. A. 296; *First Nat. Bank v. Peterborough*, 56 N. H. 38, 22 Am. Rep. 418; *N. C. Ry. Co. v. Commrs.*, 91 N. C. 454; *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586; 1 Am. & Eng. Ency. of Law, 1119; 31 Cyc. 1541.)

B. S. Varian, for Respondent.

The Idaho statute is silent as to the manner in which a bank is to be reimbursed for taxes paid by it for its shareholders. The whole theory of our law points to the conclusion that the bank has the right to apply directly to the stockholder for reimbursement. (Secs. 1653, 1672, Rev. Codes.) The state has the right to make national banks its agents to collect the taxes on their shares from the individual shareholders. (*Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236, and cases cited.)

The bank, having no lien upon the shares of its stockholders for the amount of taxes paid by it, could not follow the stock in the hands of third persons, in seeking reimbursement for taxes paid for a stockholder. (*Palmer v. Pettingill*, 6 Ida. 346, 55 Pac. 653; *Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard v. Nat. Eagle Bank*, 18 Wall. 589, 21 L. ed. 923.)

The deductions under sec. 1683 are allowed to each stockholder separately against the stock held by him individually. The credit or offset is a personal right of the stockholder and cannot be claimed by the bank. One stockholder cannot be allowed deductions for indebtedness of another stockholder. (*First Nat. Bank v. Washington Co.*, 17 Ida. 306, 105 Pac. 1053.)

A careful reading of the authorities cited to sustain appellant's position will disclose that in practically every instance the statute authorizing the taxation of bank stock provides that the bank shall have a lien upon the dividends for the payment of the taxes advanced by it. These cases are all suits brought by the state, or its tax collectors, to collect the taxes due the state, and are not in point here.

AILSHIE, J.—This action was instituted by the First National Bank of Weiser against Edward Shainwald to recover the sum of \$441.40, principal and interest paid by the bank to Washington county as taxes for the year 1908, levied and assessed against 183 shares of the capital stock of the bank. It is alleged by the complaint that on the second Mon-

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Opinion of the Court—Ailshie, J.

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day in January, 1908 (the date on which the tax lien attaches under the laws of this state), the defendant was the owner of 183 shares of the capital stock of the plaintiff bank, and that the plaintiff listed the shares of such stock for taxation for the year 1908 in conformity with the requirements of the statute of this state (sec. 1672, Rev. Codes). It is further alleged that thereafter and on the first day of January, 1909, the plaintiff bank, acting under authority and direction of the statute of the state (sec. 1672, Rev. Codes), paid the taxes levied and assessed against defendant's stock, and that he has neglected and refused to reimburse the bank in the sum thus laid out and expended. The defendant answered the complaint and admitted that he owned the stock mentioned and described in the complaint on the second Monday in January, 1908, the date on which the taxes attached for that year. He alleges that thereafter and in the month of June, 1908, he sold, assigned and transferred all his stock to one A. H. Keller, who is now, and ever since such sale has been, the cashier of the plaintiff bank.

It is also alleged by the answer that subsequent to the date of the sale and transfer of defendant's stock and prior to the first day of January, 1909, the date on which the taxes were paid by the bank, that the bank paid to Keller, the purchaser of the stock, earnings and dividends of and from such stock in an amount larger than and in excess of the sum thereafter paid by it as taxes on such stock; further, that at the time of the payment of the taxes the bank had in its possession of the earnings and surplus belonging to the stock formerly owned by the defendant and then owned by Keller a sum larger than and in excess of the amount which it paid as taxes on such stock. It is also alleged that the bank was a solvent and prosperous institution.

As a further and separate defense the defendant alleged that for more than twenty years last past it had been the regular custom and practice of the bank to pay the taxes levied and assessed against all the stock of the bank and to "deduct said taxes so paid from the gross earnings of said bank for the current year."



The court sustained a motion to strike from the answer these several defenses, on the ground that they were redundant, immaterial and constituted no defense to the plaintiff's cause of action. Judgment was thereupon entered in favor of the plaintiff, and the defendant has appealed.

The taxes on this bank stock were paid by the respondent bank under the authority and direction of sec. 1672 of the Rev. Codes, which provides among other things as follows: "The taxes upon such shares must be assessed against the holder of the same in the list of personal property, and must be paid by the bank." While the shares of stock are the personal property of the shareholder and the taxes against the same must be ultimately paid by the owner of the stock, still the statute makes the bank the agent of the stockholder and liable to the county for the tax so levied and assessed. The agency is carried over to the vendee whenever a sale of the stock is made, and the bank is no longer the agent of the original owner. Statutes of this kind have been repeatedly upheld by the supreme court of the United States. (*First Nat. Bank v. Kentucky*, 76 U. S. (9 Wall.) 353, 19 L. ed. 701; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. ed. 1069; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236; 168 Pa. 309, 31 Atl. 1065.)

The power and authority to tax national bank stock has been expressly conferred upon the state within which the bank is located. Sec. 5219 of the Revised Statutes of the United States provides, *inter alia*, as follows: "The legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." It will be noted from the foregoing quotation that the power conferred on the state to tax national bank

stock and the methods of levying and collecting such tax is *unqualified and unlimited, subject only to the two restrictions therein named*. Those restrictions have reference only to the rate to be charged and collected and the place in which the stock of nonresidents shall be taxed. The very fact that Congress authorized the assessment of the stock of nonresidents in the place where the bank is located within itself implies the necessity of either collecting the tax through the bank or else by means of garnishment, or other similar process, which will reach out and lay hold upon the stock as the same appears upon the stock-books of the corporation. If the collection depended on a personal action, in many cases it would be impossible to collect the tax at all. The power on the part of the state to do this necessarily carries with it the implied power to make such tax a lien on the stock itself and the earnings and increments derived therefrom. That is the identical thing that has been done in this state as we construe our statute (sec. 1672, Rev. Codes). The bank is required to pay the tax assessed against the stock of its stockholders. The liability on the part of the bank to pay the tax assessed against the stock carries with it an implied lien in favor of the bank and against the stock and the earnings, dividends and profits derived therefrom for reimbursement in the sum thus paid; and this must necessarily be a preferred lien over all other claims, and is a charge against the stock without regard to the person who may be the owner of the stock.

Our attention has not been directed to any decision from the United States supreme court passing upon the identical question here involved. The case most nearly in point on this particular question that we have been able to find is that of *Boston & Albany R. R. Co. v. Mercantile Trust & Deposit Co.*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97. The court there had under consideration the liability of a receiver of an insurance company to pay the taxes assessed against its stockholders where the tax had become due prior to the insolvency of the corporation. The Maryland statute there considered provided that "the tax assessed on such stock shall be levied and collected from said corporation and may be charged to

## Opinion of the Court—Ailshie, J.

the account of such nonresident stockholders." The statute there considered was, in many respects, the same as ours. It, however, went further, and in specific terms provided that the corporation should have a lien on the shares held by the stockholders to reimburse it for the payment of the taxes. The court held that the receiver must pay these taxes regardless of the insolvency of the corporation. The holding of the court on the particular point is epitomized in the syllabus as follows: "Taxes upon the shares of stock in an insurance company which are by statute charged to and made payable by the corporation are a demand payable out of its assets in the hands of its receiver in case it becomes insolvent after they become due."

*City of Muskegon v. Lange*, 104 Mich. 19, 62 N. W. 158, was an action against the cashier of a national bank for the collection of taxes due from the stockholders under a statute similar to ours, and the Michigan court said: "The bank has, what the cashier lacks, an account with the stockholder, and the shares of stock, and it has property in its possession in which the stockholder has a pecuniary interest. . . . Who can doubt that the intent of the legislature was that the payment required was to be made by the cashier from funds of the bank, and that it was to be charged against the shares of stock taxed, upon the books of the bank?" And in course of a dissenting opinion by Mr. Justice Grant in the same case, he reinforced the contention that the bank was liable for such a tax, and that it had a lien on the stock together with its earnings and dividends for the payment of such tax. He said: "The express duty is imposed upon the cashier to pay. In doing this he represents the stockholders. He has in his possession the means of payment. Whatever judgment is rendered against him is binding upon the stockholders. He can pay the judgment out of the funds in the bank which belong to them, and which are under his control. If there are no accrued dividends out of which to pay, the bank, through him, has a lien upon the stock which it can enforce to reimburse itself."

In *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832, the supreme court held that the receiver of an insolvent national bank was not liable to pay taxes on the stock of such insolvent bank where the payment would have to be made out of the assets of the bank. The court there rules that to require the receiver to make such a payment would amount to holding that the property and assets of the bank might be taxed in violation of sec. 5219 of the Rev. Statutes of the United States.

Following the decision in *Rosenblatt v. Johnston*, the circuit court of appeals for the fifth circuit held in the case of *Stapylton v. Thaggard*, 91 Fed. 93, 33 C. C. A. 353, that in a case where it appeared from the complaint that the bank was insolvent and in the hands of a receiver, under the direction of the controller of the currency, the state could not tax the shares of stock in such insolvent corporation and maintain an action to recover the tax from the receiver out of the assets of the bank. A somewhat similar holding was made in the *City of Boston v. Beal*, 51 Fed. 306. These cases last cited from the federal courts, however, all turn on the question of the insolvency of the bank and the lack of funds belonging to the stockholder and the worthlessness of the bank stock. They seem to hold that, where it is necessary in order for the bank to pay the tax that it resort to the assets of the bank itself, the bank cannot be compelled to make the payment. None of these cases, however, hold that the bank is not liable to the extent of the earnings and profits of the stock or to the extent of the value of the stock itself.

In the case at bar, it is admitted that the stock was not only valuable, but that at the time of the payment of these taxes the bank had in its possession sufficient of the earnings and undivided profits of the bank due to the holder of this stock to more than cover the amount of taxes paid and to reimburse it for its outlay. Under this state of facts, we have no doubt of the liability of the bank to pay, as it did. We are equally well satisfied that the stock and its share of earnings and undivided profits were liable to the bank to reimburse it for the amount thus laid out and expended for taxes. At the time the payment was made the bank was the agent

of the person who was then owner of the stock and made such payment for him and the benefit of the stock he then owned.

Counsel for respondent cites sec. 3324 of the Revised Codes, which provides that, "One who sells or agrees to sell personal property as his own, thereby warrants that he has a good and unencumbered title thereto," and insists that under the provisions of this statute the vendor of the stock warranted its title and that there was no encumbrance against it for taxes or otherwise. That question does not arise in this case for the reason that this is an action prosecuted by the bank against the vendor of the stock and not an action between the vendor and vendee.

It is also urged that under the authority of *Palmer v. Pettigill*, 6 Ida. 346, 55 Pac. 653, there is no such thing as a lien on personal property in this state for taxes. It is true that case so holds, and we think it correctly states the rule. It must be remembered, however, that that case was dealing with personal property generally and particularly a stock of merchandise. Taxes on bank stock are authorized by special statute, and the method of collecting such tax is specifically pointed out by statute. The rule applicable to personal property generally is not controlling in the matter of collecting taxes on bank stock.

There is a very different question, however, presented by the allegations of the answer as to the custom of the bank to pay the taxes on all the stock and charge the same up to the running expenses of the bank. Such a practice, however long it may have been indulged, is clearly contrary to the provisions of the statute. Under the statute of this state, as construed in *First National Bank v. Washington County*, 17 Ida. 306, 105 Pac. 1053, each stockholder is entitled to a deduction in the valuation of his stock to the extent of his unsecured debts due to *bona fide* residents of this state, but this would amount to nothing if the whole tax upon the bank stock may be paid out of the gross earnings of the bank. One stockholder may be entitled to no deductions whatever, while another stockholder may have deductions equal to the assessed value of the stock, in which case he would have no tax what-

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Argument for Respondent.

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ever to pay on his stock. If the whole tax was to be paid out of the undivided earnings of the bank, then the stockholder who had no tax to pay would be charged out of his part of the dividends of the bank to help pay the taxes of a stockholder who is entitled to no deductions. Such a practice is violative of the statute, and cannot be sanctioned.

It follows from what has been said that there was no error in striking out that part of the answer which pleaded the practice and custom of the bank in the matter of payment of taxes on its shares of stock. It also follows that the court erred in sustaining the motion to strike out the first separate answer to the complaint. Judgment is *reversed*, and the cause is remanded. Costs awarded to appellant.

Sullivan, C. J., concurs.\*

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(May 27, 1910.)

B. L. STEEVES, Appellant, v. BANK OF WEISER, Respondent.

[109 Pac. 260.]

APPEAL from the District Court of the Seventh Judicial District of the State of Idaho, for the County of Washington. Hon. Ed. L. Bryan, Judge.

Action to recover from a stockholder taxes paid by the bank subsequent to the sale of such stock by the stockholder. Judgment for the plaintiff and defendant appealed. *Reversed*.

Ed. R. Coulter, for Appellant, citing same authorities given in *Shainwald v. Bank*, ante, p. 290, 109 Pac. 257.

Frank Harris, for Respondent.

Appellant contends that it was the duty of the respondent bank to pay the tax out of any surplus funds or undivided

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\*On account of illness, Justice Stewart did not participate further in the decisions of the court during the period covered by this volume.—  
REPORTER.

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Points Decided.

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profits on hand, as the current expenses of banks are usually paid. We cannot admit this proposition, for two reasons: First, the appellant having sold his stock, as alleged in the stricken answer, owned no part of these funds from which he urges the tax should have been paid; and second, such a method would be inequitable as between the several shareholders of the bank, as some of them may have established credits and offsets against their assessment by reason of indebtedness owing by them, as provided by sec. 1683, Rev. Codes. (*First Nat. Bank of Weiser v. Washington Co.*, 17 Ida. 306, 105 Pac. 1053.)

AILSHIE, J.—This case was submitted at the same time and in conjunction with the case of *Shainwald v. First National Bank*, ante, p. 290, 109 Pac. 257, just decided; and it was understood and agreed that the decision in this case should follow the decision in that case. The decision in the *Shainwald* case is decisive of all the questions raised in this case, and upon the authority of that case the judgment in the present case will be *reversed* and the cause is hereby remanded. Costs awarded in favor of appellant.

Sullivan, C. J., concurs.

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(June 2, 1910.)

STATE, Appellant, v. WILLIAM WALL, Respondent.

[109 Pac. 724.]

ACTION TO RECOVER A LICENSE TAX—LIQUOR BUSINESS—DOING WITHOUT LICENSE—COMPLAINT—DEMURRER—CIVIL ACTION—CRIMINAL ACTION—LICENSE TAX FOR REVENUE—TAX TO REGULATE.

(Syllabus by the court.)

1. *Held*, under the provisions of sec. 1835, Rev. Codes, that where a person engages in the business of selling intoxicating liquors and fails or neglects to take out a license, an action may be maintained against him by the state for the recovery of the license tax.

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Argument for Appellant.

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2. Under the provisions of sec. 3801, Rev. Codes, when the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

3. Under the provisions of sec. 6983, Rev. Codes, every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by the laws of this state, without taking out or procuring the required license, is guilty of a misdemeanor.

4. Under the provisions of the statute, the license tax must be paid and a license procured before the commencement of any business or occupation requiring the payment of a license tax.

5. The license tax required to be paid before a person may engage in the business requiring a license is not imposed as a penalty, but is a debt due the county or state for doing or conducting the business. The penalty for doing such business without a license is made a misdemeanor.

6. The only action authorized by chap. 2, title 10, of the Political Code, is a civil action to recover a license tax, damages and costs of action.

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action brought under provisions of sec. 1835 to recover license tax for conducting a saloon business. Demurrer to complaint sustained. *Reversed.*

D. C. McDougall, Attorney General, J. H. Peterson and O. M. Van Duyn, Assistants to Attorney General, and J. L. Richards, Prosecuting Attorney of Washington County, for Appellant.

It is incumbent upon every person desiring to sell or carrying on the business of selling intoxicating liquors or wines to first provide himself with the necessary license. (Rev. Codes, secs. 1506-1508, 1512, 1513, 1519, 1834, and 6983.)

If any person carries on, or attempts to carry on, such business without first procuring such license, under the provisions of sec. 1835, a civil action may be instituted against him to recover the amount of such license tax. (*Bingham County v. Fidelity etc.*, 13 Ida. 34, 88 Pac. 829; *State v. Doherty*, 3 Ida. 384, 29 Pac. 855; *State v. Life Ins. Co.*, 8 Ida. 240, 67 Pac. 647; *San Luis Obispo County v. Hendricks*, 71



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Cal. 242, 11 Pac. 682; *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385; *State v. Hoeppner*, 9 Wash. 680, 38 Pac. 157; 12 Am. & Eng. Ann. Cas. 173 (note); *Crawford County v. Laub*, 110 Iowa, 355, 81 N. W. 590; *Guedert v. Emmet County*, 116 Iowa, 40, 89 N. W. 85; *State v. White*, 115 La. 779, 40 So. 44; *Burfiend v. Hamilton*, 20 Mont. 343, 51 Pac. 161; *Markle v. Newton*, 64 Ohio St. 493, 60 N. E. 619; *People's Bldg. etc. Assn. v. Hanson*, 7 Ohio Dec. 179.)

Sec. 3801, Rev. Codes, provides that "When the violation of a right admits of both civil and criminal remedy, the right to prosecute the one is not merged in the other." That both civil and criminal actions may be maintained for the same acts is borne out by the following authorities: *State v. Doherty*, *supra*; *State v. Raymond*, 12 Mont. 226, 29 Pac. 732; *State v. Hoeppner*, *supra*; *State v. Hughes*, 24 Mo. 147; *State v. Pate*, 67 Mo. 488; *Elsberry v. State*, 52 Ala. 8; *Bolduc v. Randall*, 107 Mass. 121; Bish. St. Crimes, sec. 1001.

Ed. R. Coulter, Frank Harris and Chas. M. Kahn, for Respondent.

It is the contention of the respondent that sec. 1835, Rev. Codes, so far as the same applies to the recovery of liquor licenses, has been repealed and is not now in force and effect.

"Where a revision of the codes is ambiguous and of doubtful meaning and susceptible upon its face to two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the acts in question, the mischief intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine its proper construction." (Sec. 450, Lewis' Sutherland on Stat. Construction, 2d ed.)

The licenses for which the prosecuting attorney was authorized by sec. 1835 to institute suits for the recovery thereof were licenses for revenue only. In none of the cases enumerated in sections of the act of 1874-75, or in chapter 2, Rev. Codes, does the person engaging in the business for which said taxes are demanded have to make application or give any

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bond for running of the business for which the license was asked.

The present liquor law under which we are now operating had its origin in an act of the legislature approved Feb. 6, 1891, entitled "An Act to Regulate the Sale of Intoxicating Liquors." (Sess. Laws 1891, p. 33.)

Sec. 22 of this act distinctly repeals sec. 1648, Rev. Stats. of 1887, and all acts or parts of acts inconsistent with its provisions. The act of 1891 is not an act for revenue, but, as the title of the act indicates, is an act to regulate the sale of intoxicating liquors. (*State v. Doherty*, 3 Ida. 384, 29 Pac. 855.)

SULLIVAN, C. J.—This action was brought on the 12th of August, 1909, in the name of the state, against the defendant, under the provisions of sec. 1835 of the Rev. Codes, to recover a license tax and damages for sales of intoxicating liquor made by the respondent during the year ending August 12, 1909, in the town of Midvale, Midvale precinct, Washington county.

It is alleged in the complaint that said defendant did keep for sale large quantities of intoxicating, spirituous, malt and fermented liquors and wines, and did during said year sell and carry on the business of selling said liquors and wines to divers and many persons; that during said time said defendant was without any license or proper authority to make said sales or to carry on the business of selling such liquors and wines; that thereby and by reason of the premises, the sum of \$750 became and was due from said defendant, and payable to the collector of license taxes for the sale of intoxicating, spirituous, malt and fermented liquors and wines in said county; that no part of said \$750 has been paid, and that the same is now due, and prays for judgment for \$750 and for damages in the sum of \$20 and for costs of suit.

To said complaint the defendant interposed what was in effect a general demurrer, which was sustained, and the plaintiff refused to plead further, and judgment of dismissal was entered. From that judgment this appeal was taken.

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The only question presented is whether the court erred in sustaining said demurrer.

This action is brought under the provisions of sec. 1835, Rev. Codes of 1909, which is the same as sec. 1637, Rev. Statutes of 1887, and is as follows:

“Against any person required to take out a license who fails, neglects or refuses to take out such license, or who carries on, or attempts to carry on, business without such license, the collector may direct suit in the name of the state of Idaho as plaintiff, to be brought for the recovery of the license tax, and in such case either the collector or prosecuting attorney may make the necessary affidavit for a writ of attachment, which may issue without any bonds being given on behalf of the plaintiff. In case of a recovery by the plaintiff, twenty dollars damages must be included in the judgment and costs to be collected from the defendant, and when collected five dollars thereof must be paid to the collector and fifteen dollars to the prosecuting attorney prosecuting the suit.”

The court, in sustaining said demurrer, in effect held that the provisions of said sec. 1835 are not applicable to this case, and that this action cannot be maintained under its provisions. It is contended by counsel for respondent that at the time sec. 1835 was adopted the statute in regard to licensing the business of selling intoxicating liquors was enacted for the purpose of revenue only, and not for the purpose of regulating business, and that the laws of this state now governing and controlling the business of selling intoxicating liquors are for the purpose of regulating said business and not for the purpose of revenue; that since they are for the purpose of regulation, the provisions of said sec. 1835 are not applicable, and the license tax cannot be collected by an action thereunder; that the only remedy of the state under the present law is a criminal action against the party selling intoxicating liquor without a license, under the provisions of sec. 6983 of the Rev. Codes.

There is nothing in those contentions. It is clear that our present license law, so far as the selling of intoxicating liquors

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is concerned, is for the double purpose, first of regulating, and, second, of raising revenue, and under the provisions of sec. 3801, Rev. Codes, when the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. And aside from that section, we have said sec. 1835, which provides a civil action for the collection of the license tax, whether such tax be for revenue or regulation. By our statute it is made a misdemeanor to commence the business of selling intoxicating liquors without first having obtained a license, and before a license can be obtained, the license tax must be paid. So if one does begin the business without having procured a license and paid the license tax, the collection of the license tax may be enforced against him under the provisions of said sec. 1835, and he may be prosecuted for a misdemeanor for doing business without a license, under the provisions of said sec. 6983, Rev. Codes.

It is alleged in the complaint that the respondent had conducted said business for a year prior to the commencement of this action. He has therefore had the benefit or profit of conducting said business for a year without a license, and is liable to the state for the amount of the license tax. The license tax is not imposed as a penalty, but is a debt due the county or state for doing or conducting the business. The penalty for doing the business without a license is provided for by the criminal law.

In *San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682, the court said: "The license tax sought to be recovered in this action is not a penalty, but in the nature of a debt due from the defendant to the county, or, what is the same thing for present purposes, a duty devolved upon the defendant personally, which can be enforced precisely as though he had contracted with the county to pay such sum of money." In *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385, the court cites and quotes with approval from the case above cited, and holds that the license tax sought to be recovered in that action was not a penalty, but in the nature of a debt due from the defendant, which could be enforced precisely as

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though he had contracted to pay the same. In the case at bar it was the duty of the defendant to pay the license tax before beginning business, and this action was brought to enforce the precise duty or obligation he was under to pay the license tax before beginning business. It is immaterial whether the license tax is imposed primarily for revenue or for regulation; and in either case its collection may be enforced as provided by sec. 1835.

In *Bingham Co. v. Fidelity Co.*, 13 Ida. 34, 88 Pac. 829, this court held that a license must be procured before the commencement of any business, the conducting of which required a license, and that if the party pays the tax to the sheriff and engages in the business before the board grants him the license, and the board finally refuses to grant the license, he cannot recover the license tax so paid. If a person commences such business without a license, he is not only liable to the county for the license tax, but also may be prosecuted criminally for doing the business without a license. It is contended that the rule there laid down is *dictum* in that case. Be that as it may, it is a correct rule of law as applied to the question here involved.

It is contended by counsel for respondent that since the license law of this state has been changed to one of regulation instead of one to raise revenue, the only action now authorized against one who sells intoxicating liquors without a license is a criminal action under the provisions of sec. 6983, Rev. Codes, and that no civil action can be maintained now for the recovery of a license tax under the provisions of sec. 1835. We are unable to concur in that contention. Sec. 1836, Rev. Codes, provides that upon a trial of any action authorized by the chapter of the code in which said section is found, chap. 2, title 10, of the Political Code, the defendant is deemed not to have procured the proper license unless he either produce it or proves that he did procure it. But he may plead in bar of the action a recovery against him and the payment by him in a civil action of the proper license tax, together with damages and costs. The only action authorized by said chapter is the action provided for in said section 1835 to recover

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the license tax, damages and costs. Said chapter does not authorize or direct the criminal prosecution of a defendant who has violated the provisions of the license tax law.

The complaint states a cause of action and the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded for further proceedings. Costs are awarded to the appellant.

Ailshie, J., concurs.

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(June 2, 1910.)

STATE, Appellant, v. CAMBRIDGE CLUB, Respondent.

STATE, Appellant, v. FRED ROE, Respondent.

STATE, Appellant, v. JOHN HENDELL, Respondent.

STATE, Appellant, v. CLARA MANSON, Respondent.

[109 Pac. 726.]

SULLIVAN, C. J.—Each of the above-entitled actions involves precisely the same question involved in the case of *State v. Wall, ante*, p. 300, 109 Pac. 724, decided at this term of court, and it is stipulated by respective counsel that the decision of said cases should follow the decision in said Wall case. Upon the authority of the Wall case the judgments of the district court in said cases are reversed and the causes remanded for further proceedings. Costs are awarded to the appellant.

Ailshie, J., concurs.

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(June 2, 1910.)

STATE, Appellant, v. T. S. YOUNGBLOOD, Respondent.

[109 Pac. 726.]

SULLIVAN, C. J.—This case was submitted by stipulation at the time of the submission of the case of *State v. Wall, ante*, p. 300, 109 Pac. 724, and the complaint contained the same

## Points Decided.

allegations as the complaint in that case, with the exception that it is alleged that defendant Youngblood was engaged in the drug business at the time he is charged with selling intoxicating liquors.

Sec. 1522 of the Rev. Codes expressly prohibits druggists from selling intoxicating liquors to be drunk on the premises, and it is contended by counsel for respondent that this action is an attempt to license a business which is prohibited expressly by statute, and that cannot be done. There is nothing in that contention. The fact that Youngblood was engaged in the drug business would not relieve him from paying the license tax for carrying on the business of selling intoxicating liquors the same as saloonmen generally conduct it, any more than it would relieve a groceryman from paying the license tax for carrying on the business of selling intoxicating liquors. That being true, under the stipulation, upon the authority of the case of *State v. Wall*, ante, p. 300, 109 Pac. 724, the judgment must be reversed and the cause remanded for further proceedings. Costs are awarded to appellant.

Ailshie, J., concurs.

(June 7, 1910.)

CHASE NATIONAL BANK OF NEW YORK, Appellant,  
v. M. P. MEHOLIN, Receiver, Respondent.

[109 Pac. 510.]

PROMISSORY NOTE—ATTORNEYS' FEES—STIPULATION FOR—EXCHANGE.

(Syllabus by the court.)

1. *Held*, under the facts of this case that the stipulation for attorneys' fees or legal services was in regard to the collection of collateral notes, and did not contemplate attorneys' fees for the collection of the principal note.

2. Where it is stipulated in a promissory note that a debt shall be paid at the residence of the payee and that the payer shall also pay exchange charges, and the payee thereafter receives and accepts the payment at the residence of the payer, he thereby waives exchange charges and cannot thereafter recover such charges.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action to recover attorneys' fees and exchange charges. Judgment for defendant. *Affirmed.*

Cavanah & Blake, for Appellant.

The terms of the note apply to all amounts realized from a sale of the notes or collection of any of said collateral security or the note. Therefore, the payee in the note is entitled to all expenses paid by it as attorney's fees for services disclosed by the facts which are legal services. (*McGhee v. Importers' & Traders' Nat. Bank*, 93 Ala. 192, 9 So. 734; *Monroe v. Staser*, 6 Ind. App. 364, 33 N. E. 665.)

After the Capital State Bank was placed in the hands of a receiver by order of the court in an action instituted by Orlando Bacon, it became necessary for the appellant to file its claim upon its note, and by so doing the holder of the note is entitled to an attorney fee. (*Davidson v. Vorse*, 52 Iowa, 384, 3 N. W. 477.)

Wyman & Wyman, for Respondent, cite no authorities.

SULLIVAN, C. J.—This action was brought against the receiver of the Capital State Bank of Boise City to recover the sums of \$904.54, paid by appellant as attorneys' fees in the collection of a balance due upon a promissory note of the respondent, and \$22.34 paid as exchange charges in remitting money from Boise, Idaho, to New York City.

The case was submitted to the court on an agreed stipulation of facts, which, in substance, discloses that the appellant is engaged in the banking business in the city of New York, and said Capital State Bank was also engaged in the same business in Boise City; that on January 20, 1908, said Capital State Bank failed and was placed in the hands of a receiver; that on December 19, 1907, appellant loaned and advanced to said Capital State Bank the sum of \$50,000, as evidenced by its promissory note, and at the time of the execution of said



note said Capital State Bank delivered to appellant certain collateral notes, which are set forth in the stipulated facts; that immediately thereafter said Capital State Bank was placed in the hands of a receiver, and appellant placed said promissory note with said collateral notes in the hands of the law firm of Cavanah & Blake of Boise City for attention and collection, who thereafter filed with the receiver the claim of appellant in writing, claiming the sum of \$18,594.11 as the balance then due as principal and interest on said promissory note, and also claimed \$904.54 as attorneys' fees and \$22.34 as exchange charges; that in remitting the amount paid by the receiver from Boise to New York City, the appellant paid in exchange said sum of \$22.34; that the services rendered by the said law firm in said matter were in preparing and filing said claim of appellant with the receiver and in collecting from said receiver and the makers of said collateral notes said sum of \$18,594.11, and in appearing and assisting on behalf of plaintiff in the case of *State v. Walter S. Bruce*, a former receiver of said Capital State Bank, in the district and supreme courts of Idaho, which involved the question as to the preference right of the state to the funds held by the receiver as against other creditors; that said attorneys' fees and exchange, excepting the sum of \$532.35, have not been paid; that said sums are reasonable for said legal services and exchange charges; that at the time appellant filed its said claim with said receiver, and at different times thereafter, the receiver requested appellant's attorneys not to proceed by suit against the makers of the collateral notes, as such action would hinder and delay the receiver in the collection of other sums owing to the Capital State Bank, and for that reason no suits were brought by appellant on said collateral notes; that about August 22, 1908, appellant presented to the respondent a statement of the balance claimed to be due the appellant on account of said notes, from which it appeared that there was \$2,611.95 due at that time; that said sum did not include the claim of appellant for attorneys' fees and exchange charges; that respondent believing said account to be correctly stated, thereupon paid the said sum of \$2,611.95,

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leaving the question of liability for attorneys' fees and exchange to be settled by the court; that said account was not correctly stated, as appellant had not given respondent credit for \$532.35 collected by appellant through the First National Bank of Boise City, Idaho, on one of said collateral notes without the knowledge of appellant's or respondent's attorneys; that shortly thereafter the respondent first discovered that appellant had collected said sum of \$532.35, and he immediately thereupon demanded payment thereof from appellant, but appellant is retaining said sum to apply on said attorneys' fees and said exchange charges.

Respondent prayed for judgment in his answer by way of counterclaim for said sum of \$532.35, and the court thereupon rendered a judgment for that amount. This appeal is from the judgment.

The only question involved in this case is whether or not the promissory note executed by the Capital State Bank is broad enough in its terms to provide for the allowance of attorneys' fees and exchange charges under the stipulated facts. There is no question but that said note provides for attorneys' fees under some circumstances. The trial court held in effect that said promissory note did not provide for exchange charges, and only provided for an attorney's fee in case of a sale of the collateral notes therein referred to. It is contended by counsel for appellant that the court erred in holding that before an allowance of an attorney's fee could be made, under the terms of said promissory note, a sale of the collateral notes given as security for its payment must occur. That part of the promissory note which relates to this question is as follows:

"And hereby authorize said bank upon or after the non-performance of this promise or upon or after failure to furnish further security as hereafter agreed, to sell the whole or any part of said collateral security, or substitutes therefor or additions thereto, at any Brokers' Board or at public or private sale at the option of said Chase National Bank without notice of intention to sell or of time or place of sale and without demand of payment of this note or of any of said

demands and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization, or collection of any of said collateral security, substitutions or additions, or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms."

Omitting certain qualifying phrases, said contract would read as follows:

"And hereby authorize said bank . . . . to sell the whole or any part of said collateral security . . . . and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization or collection of any of said collateral security . . . . or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands in whole or in part, due or not due, including this note, making a rebate of interest upon demands not matured by their terms."

Said provision of the contract as above skeletonized is perfectly clear to our minds as to its meaning, if the phrase, to wit, "including this note," be excluded therefrom. All of the legal services referred to clearly apply to the collection of the security notes, omitting that phrase. Said contract clearly contemplates the payment of attorneys' fees out of the proceeds of the sale of the collateral notes, provided legal services are necessary and are rendered in the sale or collection of the security notes. The provisions of the original promissory note contemplate the payment of it out of the sale or collection of the security notes, provided the maker fails to pay it. That contract does not contemplate the bringing of a suit on the principal note or the payment for legal services for its collection; but the legal services contemplated were services in regard to the sale or collection of the security notes and out of the proceeds resulting from such sale or collection the principal note was to be paid. That being true, we do not think that it was intended that said phrase, to wit, "including this note," contemplated the payment for legal

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**Points Decided.**

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services for the collection of the principal note, as that note was to be paid from the proceeds of the sale or collection of the collateral notes, and the legal services to be paid for were such services as might be rendered in the sale and collection of such security notes and to be paid out of the proceeds derived from the sale or collection of such security notes.

In regard to the payment of exchange charges, the appellant might have refused, under its contract, to receive the money at any other place than at its banking-house in New York City, when as a matter of fact it did accept the payment in Boise City and did not at that time exact the payment of the exchange charge. That being true, the appellant cannot now recover that charge.

We therefore conclude that the judgment of the district court must be affirmed, and it is so ordered, with costs in favor of the respondent.

**Ailshie, J., concurs.**

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(June 14, 1910.)

**FRED VEATCH, Appellant, v. CITY OF MOSCOW et al.,  
Respondents.**

[109 Pac. 722.]

**FUNDING BONDS—AUTHORITY OF MUNICIPALITY TO ISSUE—CREATION OF  
INDEBTEDNESS—STATUTES—CONSTRUCTION OF.**

(Syllabus by the court.)

1. Under the provisions of sec. 2315, Rev. Codes, a municipality has the authority to issue refunding bonds for the purpose of redemption of outstanding indebtedness when the same can be done to the profit and benefit of the municipality, and this may be done without the submission of the question of the issuance of such bonds to the electors of the municipality.

2. The provisions of sec. 2316, Rev. Codes, were not intended to apply to the issuance of refunding bonds of municipalities when the issuance of such bonds would not create an additional indebtedness or liability of the municipality.

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Argument for Respondents.

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3. Under the constitution of this state, the legislature has authority to empower municipalities to negotiate for the sale and issuance of refunding bonds without submitting the question to the electors of such municipality, where it can be done to the profit and benefit of the municipality and without incurring any additional liability.

4. The issuance of refunding bonds is not the creation of a new indebtedness within the meaning of the provisions of sec. 3, art. 8, of the constitution, when it does not increase the indebtedness or liability of the municipality.

5. So far as the decision in the case of *Bannock Co. v. Bunting*, 4 Ida. 156, 37 Pac. 377, is in conflict with the views expressed in this opinion, it is overruled.

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

Action to enjoin the city of Moscow from issuing refunding bonds. Judgment for defendant. *Affirmed*.

A. W. Witherspoon, for Appellant.

The supreme court of the United States in *Township of Doon v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. ed. 1044, held that the issuance of refunding bonds creates a new indebtedness. This court has adopted the law laid down by the supreme court of the United States in the case above mentioned, and cited the same quite at length in the case of *Bannock County v. Bunting*, 4 Ida. 156, 37 Pac. 277.

C. J. Orland, for Respondents.

The issue of refunding bonds does not create or increase a debt; merely changes the form of indebtedness. In this case it simply changes one bond into another bond of the same amount and denomination. (*Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Geer v. Commrs.*, 97 Fed. 435, 38 C. C. A. 250; *Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817, 63 C. C. A. 467; *Murry v. Fay*, 2 Wash. 352, 26 Pac. 533; 1 Abbott's Mun. Corp., sec. 190; *Mitchell v. Smith*, 12 S. D. 241, 80 N. W. 1077; *Cass Co. v. Wilbarger Co.*, 25 Tex. Civ. App. 52, 60 S. W. 988; *Butler v. City of Lewiston*, 11 Ida. 403, 83 Pac. 234.)

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The presumption is that the officers of the city of Moscow will do their duty, and that the money arising from the sale of these refunding bonds will be applied in paying off the bonds now outstanding. (*City of Huron v. Second Ward Sav. Bk.*, 86 Fed. 279, 30 C. C. A. 38.)

SULLIVAN, C. J.—This action was brought against the city of Moscow, a municipal corporation, to restrain and enjoin the officers of said city from issuing refunding bonds for the purpose of refunding an indebtedness represented by sixteen one thousand dollar coupon bonds, said bonds having matured on or about November 1, 1909. After the maturity of said bonds, the city having no funds on hand with which to pay the same, the city council passed an ordinance on February 7, 1910, providing for the issuance of the refunding bonds involved in this action. Thereafter notices were given as required by law, and bids were received by the city of Moscow for the purchase of said bonds. The Union Trust Company of Spokane being the highest bidder therefor, the council ordered said bonds sold to said company. The city council refused to submit the question of the issuance of said bonds to a vote of the people, and this action was instituted against the city to enjoin it from issuing said bonds for that reason.

A general demurrer was interposed to said complaint and was sustained by the court and judgment of dismissal entered. From that judgment and the order sustaining the demurrer this appeal was taken.

The question is raised whether or not the city of Moscow is authorized and can legally issue the refunding bonds referred to, without first submitting the question to the electors of said city, and the main question presented by respective counsel is: Does the issue of refunding bonds to retire bonds which are due increase the indebtedness of the city within the meaning of sec. 3 of art. 8, of the constitution of Idaho?

Under the provisions of subd. 8 of sec. 2315, Rev. Codes, it is provided, among other things, that every town incor-

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porated under the laws of this state may issue bonds under the fourth subdivision of said section, for the purpose of funding, refunding, purchase or redemption of the outstanding indebtedness of any city or town, when the same can be done to the profit and benefit of the city or town, and without incurring any additional liability, "without the submission of the question of the issuance of such bonds to the electors of the city or town."

It is provided by sec. 2316 of the Rev. Codes that if an ordinance is passed to fund or refund an existing indebtedness, the ordinance must also provide for the holding of an election of the qualified electors who are taxpayers of the city or town, while sec. 2315 expressly provides that bonds may be issued for the funding or refunding of outstanding indebtedness without the submission of the question of the issuance of such bonds to the electors, when it can be done to the profit and benefit of the municipality and without incurring any additional liability.

Said two sections are not harmonious in their provisions, but from the history of the enactment of said sections, it is clear that it was not intended that a vote should be required for the issuance of refunding bonds by municipal corporations when it could be done to the profit and benefit of the municipality and without incurring any additional liability. Said two sections of the Revised Codes were first enacted in one act with other sections. (Sess. Laws 1899, p. 29.) Sec. 1 of that act is sec. 2315 of the Rev. Codes, with the exception that that part of subd. 8 of sec. 1 relating to the issue of bonds under the fourth subdivision has been placed in this section of the code, when originally it was section 8 of that act. (See p. 33, Sess. Laws, 1899.) This indicates to us that sec. 2316 in the original act was not intended to govern the issuance of refunding bonds, at least so far as a submission of that question to the electors was concerned. Sec. 8 of the original act was evidently intended to exempt from the operation of sec. 2 the bonds that could be issued under the provisions of the fourth subdivision of sec. 1, and not

to require a vote of the electors to be taken upon the question of the issuance of such refunding bonds.

Sec. 2315 settles the question of the authority of the city to issue such bonds without submitting the question to the electors of the city, provided said provision of the statute is not in conflict with any provision of the state constitution. Sec. 3 of art. 8 of the constitution provides that no municipality therein named "shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose," etc. If the issuance of said refunding bonds creates an indebtedness or liability, then the city cannot issue them without a vote of the people. Then, does the issuance of said refunding bonds create any additional liability or indebtedness?

It is stated in sec. 190, 1 Abbott on Municipal Corporations, that it has been repeatedly held that the refunding of an indebtedness does not increase or create a debt but merely changes its form, and it is said: "The authorities are uniform to the effect that where legislative authority exists the proper officials have the power to negotiate for an issue of refunding bonds without submitting the question to the electors of the district," and cites *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. ed. 1044, and other authorities,—among them, *Pratt Co. Commrs. v. Society for Savings*, 90 Fed. 233, 32 C. C. A. 596. In the latter case the court, referring to the argument of counsel to the effect that the proper authorities were prohibited from refunding the debt evidenced by a judgment without a vote of the people, said: "The argument is too subtle and ingenious to be sound. . . . The refunding of a debt in the legal method . . . is not borrowing money, nor is the exchange of bonds for a judgment the making of a loan. . . . Such an exchange neither creates nor increases the debt; it simply changes the form of it."



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In *Geer v. Board*, 97 Fed. 435, 38 C. C. A. 250, in answering a similar question, the court said:

"The answer to the proposition is that the prohibition of the constitution of Colorado is against the creation of a debt by loan, and the mere exchange of the judgments against a county for its refunding bonds creates no debt by loan, or in any other way. The debts existed before as well as after the exchange. The judgments and the bonds are nothing but the legal evidences of the existence of these debts, and the exchange of the one for the other merely changes the form of the obligations."

It was held in *City of Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580, as follows:

"A bond is not an indebtedness or liability; it is only the evidence or representative of an indebtedness. And a mere change in the form of the evidence of indebtedness is not the creation of a new indebtedness within the meaning of the constitution. (*Opinion of Justices*, 81 Me. 602, 18 Atl. 291; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Board of Commrs. v. Board of Commrs.*, 26 Kan. 181, 201; *City of Poughkeepsie v. Quintard*, 65 Hun, 141, 19 N. Y. Supp. 944.) The case of *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. ed. 1044, appears to be opposed to this view; but we are unable to assent to the reasoning of the majority of the court in that case, and think that the correct rule is stated in the dissenting opinion."

The whole trouble upon this question is occasioned by the decision of the supreme court of the United States in *Doon Tp. v. Cummins*, *supra*. Aside from that case, the decisions upon this question from the courts of last resort in this country are almost unanimous against the rule laid down in that case. The majority opinion in that case is to the effect that the issue of refunding bonds does increase the indebtedness of a municipality, and is in conflict with that provision of the Iowa state constitution prohibiting the creation of indebtedness beyond a certain limit. The courts have almost unanimously refused to follow the rule in that case, and it will be observed that there was a vigorous dissenting

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opinion therein written by Mr. Justice Brown and concurred in by Justices Harlan and Brewer, and the reasoning contained in the dissenting opinion seems to commend itself to the state courts of last resort, rather than that of the majority opinion. The majority opinion in that case establishes a rule that would make it impossible in many cases to refund indebtedness, and we do not think it was the intention of the framers of our constitution to prevent the refunding of an existing indebtedness when such refunding does not increase the liability or indebtedness of the municipality.

This court held in *Butler v. City of Lewiston*, 11 Ida. 393, 83 Pac. 234, as follows:

“The bonds proposed to be issued are to be issued for the purpose of funding the outstanding warrant indebtedness of the city. Such bonds will not increase the legal indebtedness of the city, but simply change the form of existing indebtedness from warrant to bond.”

As bearing upon this question, see *Le Tourneau v. City of Duluth*, 85 Minn. 219, 88 N. W. 529; *Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817, 63 C. C. A. 467; *Murry v. Fay*, 2 Wash. 352, 26 Pac. 533; *Mitchell v. Smith*, 12 S. D. 241, 80 N. W. 1077; *Cass Co. v. Wilbarger Co.*, 25 Tex. Civ. App. 52, 60 S. W. 988.

So far as the decision of this court in *Bannock Co. v. Bunting*, 4 Ida. 156, 37 Pac. 277, is in conflict with the views expressed in this opinion, it is overruled.

The issue of a refunding bond does not generally create a new indebtedness, and it is so held by the great weight of authority, but it simply changes the form of the indebtedness and usually reduces the rate of interest. There is no presumption that the officers of a municipality will not make proper application of the funds procured from the sale of refunding bonds.

We therefore conclude that the issue of a refunding bond by a municipality does not increase or create a debt, and that the issue of such bonds for the purpose of funding an existing legal indebtedness is not required to be submitted to a vote of the qualified electors, but that the city council or vil-

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Points Decided.

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lage trustees by ordinance may authorize the issue of such refunding bonds when it can be done to the profit and benefit of the municipality and without incurring any additional liability.

The judgment of the trial court is therefore affirmed and the cause remanded, with costs in favor of respondents.

Ailshie, J., concurs.

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(June 15, 1910.)

**JAMES MCGREGOR, Appellant, v. SIGNA JENSEN et al.,  
Respondents.**

[109 Pac. 729.]

**PROBATE COURT—REAL ESTATE—ADMINISTRATOR'S SALE OF—CONFIRMATION OF SALE—OBJECTIONS TO CONFIRMATION—APPEAL TO DISTRICT COURT—TRIAL DE NOVO—EVIDENCE—SETTING ASIDE ORDER OF CONFIRMATION—DISPROPORTIONATE BID—ACCEPTANCE OF NEW BID—RIGHTS OF BIDDER.**

(Syllabus by the court.)

1. Under the provisions of sec. 5520, Rev. Codes, when an administrator makes a sale of real estate, he must make a return of his proceedings to the probate court, and a hearing upon such return for the confirmation of the sale must be had and notice thereof must be given in compliance with the provisions of said section. Objections may be made to the confirmation of the sale by anyone interested. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the court finds that the proceedings were unfair or the sum bid disproportionate to the value of the property sold, and if it appears that a sum exceeding such bid by at least ten per cent exclusive of the expenses of a new sale may be obtained, the court may vacate the sale and direct another to be had; if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is then in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

2. *Held*, that the phrase "disproportionate to the value," as used in said section 5520, means disproportionate to the value at the time the bid was made.

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Argument for Appellant.

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3. Where objections are made to the confirmation of the sale and on a hearing it appears to the probate court that the sale was fair and that the sum bid was a reasonable and fair value for the property sold, it is the duty of the probate court to confirm the sale.

4. On an appeal from an order confirming a sale, the district court is authorized to try the case anew upon the issues made in the probate court, and if it appears from the evidence adduced on the hearing that the proceedings were fair and the sum bid is not disproportionate to the value of the property sold, it is the duty of the district court to affirm the order of confirmation made by the probate court.

5. *Held*, that the evidence introduced on the trial in the district court establishes the facts that the proceedings in regard to the sale of the real estate involved were fair and regular, and that the bid offered and accepted by the probate court was not disproportionate to the value of the property at the time said bid was made.

6. *Held*, that the district court erred in setting aside the order confirming the sale of said real estate and accepting the bid of Jensen.

APPEAL from the District Court of the Sixth Judicial District, for Custer County. Hon. Edward A. Walters, Presiding Judge.

From a judgment setting aside an order for the confirmation of the sale of real estate and refusing to confirm the sale by the district court on an appeal from the probate court, the purchaser at the sale appeals. *Reversed*.

W. W. Adamson, for Appellant.

The district court had no right or authority under the law to accept a new bid for the sale of the property; all that it had jurisdiction to do was to reverse the judgment of the probate court and send back the case with instructions to order a new sale, for the making of a new bid in the district court constituted the framing of a new issue, the making of the finding upon a new issue that was not before the probate court and the entering of a judgment beyond the issues framed in the probate court. (*Estate of Skelly*, 21 S. D. 424, 113 N. W. 91-93.)

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Sec. 5520, Rev. Codes, is identical with sec. 1552, Kerr's C. C. P., Cal. (*In re Leonis' Estate*, 138 Cal. 194, 71 Pac. 171. See, also, *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847; *Allen v. Martin*, 61 Miss. 78; *Howell v. Mills*, 53 N. Y. 322; *Lefevre v. Laraway*, 22 Barb. 167.)

Milton A. Brown, for Respondents.

"Trial *de novo*" means "to try anew" or "a second time," that is, to retry the case upon the original papers and upon the same issues as the case was tried in the probate court. (*Estate of McVay*, 14 Ida. 64, 93 Pac. 31.)

Upon a proper showing the probate court had power to order the Jensen bid accepted and the property transferred to Mr. Jensen. Is it possible to suppose that the district court while exercising its appellate power and conducting a trial *de novo* did not have the same power, or at least such power as would authorize the district court to certify such a judgment back to the probate court for execution? (*Fisher v. Board*, 4 Ida. 381, 39 Pac. 552; *Latah County v. Hasfurther*, 12 Ida. 797, 88 Pac. 433; *Gardner v. Blaine Co.*, 15 Ida. 702, 99 Pac. 826.)

When the appeal is taken on questions of both law and fact (as in this case), "The procedure seems to be plain, . . . and thereafter the latter court has exclusive jurisdiction and its judgment is final." (*Maxson v. Superior Court*, 124 Cal. 468, 57 Pac. 379.)

The plain intent of the statute is to allow the probate court, or the district court on an appeal, when there has been anything unfair in the proceeding, or it appears that the price bid is disproportionate to the value of the property, and it appears that a bid ten per cent, etc., may be obtained, to order a new sale. (*Estate of Griffith*, 127 Cal. 543, 59 Pac. 988; *Estate of Reed*, 3 Cal. App. 142, 85 Pac. 155; *Griffin v. Warner*, 48 Cal. 385.)

SULLIVAN, C. J.—This is an appeal from a judgment of the district court reversing and setting aside an order of the probate court of Custer county, confirming the sale of cer-

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tain mining claims to the appellant, James McGregor, for the sum of \$1,675. One feature of this case was before this court at its January, 1909, term. (See *In re Estate of Christensen*, 15 Ida. 693, 99 Pac. 829.) That appeal was from the order of the district court dismissing the appeal from the probate court. The case was tried *de novo* in the district court upon the return of the *remittitur* from this court. The plaintiff introduced testimony in support of the confirmation of the sale of said mining claims. Signa Jensen, the contestant, offered no testimony in support of her objections to the confirmation of the sale, but Nels C. Jensen, a stranger to the suit up to the date of the trial in the district court, filed a bid of \$1,900 with the district court for such mining claims and costs of a resale. The district court accepted the bid of Jensen and entered judgment vacating the order confirming the sale to Nels C. Jensen, who was made one of the respondents here, accepted his bid of \$1,900 for said property, and ordered that said judgment be certified back to the probate court of Custer county. From that judgment this appeal is taken.

Some question was raised on the oral argument about the transcript containing all of the evidence produced on the trial in the district court. That matter has been fully settled by stipulation of respective counsel, to the effect that the record contains a full, true and correct statement of all the evidence introduced before the district court at the trial or hearing of said cause.

Two errors are assigned: The first is that the court erred in accepting the bid of said Jensen, and the second, that the court erred in making the order confirming the sale to Jensen and vacating and setting aside the order of the probate court confirming the sale to McGregor.

On the former appeal, this court held that the return to the order of sale and the objections thereto constituted the issues to be tried by the district court. In *Re Estate of McVay*, 14 Ida. 64, 93 Pac. 31, this court held that the district court had appellate jurisdiction from the probate court in probate matters to retry the same issues at law and fact as

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were heard and determined by the probate court. The issues in the case at bar were made by the return to the order of sale and the objections made to the confirmation of the sale, and the district court was authorized to try and determine only those issues. Upon the trial, the evidence produced by the plaintiff showed that the proceedings were all regular, and that the said mining claims were sold for all they were worth. The testimony also shows that the administrator, prior to said sale, requested the said Nels C. Jensen to put in a bid for said mining claims, but he declined to do so. The respondent, Signa Jensen, produced no evidence whatever in support of her objections to the confirmation of said sale. Nels C. Jensen thereupon made his bid of \$1,900 for said claims, which was made nearly two years after McGregor's bid of \$1,675 had been accepted and confirmed by the probate court, and the bid so offered by Jensen was accepted and confirmed by the district court.

The property was offered for sale in 1907; the sale was made to McGregor in January, 1908, and confirmed by the probate court on the 5th day of February, 1908. McGregor expended in doing assessment work and in protecting and improving the claims, prior to the time of the trial in the district court, more than \$200. Adding that to the interest on his money would indicate that the claims would cost him, at the time Nels C. Jensen made his bid, more than \$1,900, and it will not be contended that whatever amount was necessary to protect the title to said claims from the time McGregor's bid was accepted and confirmed up to the date of the trial of the appeal in the district court would not be a legal claim against said estate in case McGregor's bid was set aside. As we view it from all of the evidence, Jensen's bid of \$1,900 was not as beneficial to the estate at the time it was made as was the bid of McGregor at the time it was made.

Sec. 5520 of the Rev. Codes is as follows:

"The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any

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time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale."

Under the provisions of that section, upon the hearing had for the confirmation of the sale, the court must examine the return and witnesses in relation to the same, and if the court finds that the proceedings were unfair or the sum bid disproportionate to the value of the property sold, and if it appear that a sum exceeding such bid, at least ten per cent exclusive of the expense of a new sale, may be obtained, the court may then vacate the sale and direct another to be made; and the last provision of said section is to the effect that if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is then in the discretion of the court to accept such offer and confirm the sale to such person, or order a new sale. The "discretion" there referred to, of course, is a legal discretion; but before the court can exercise that discretion, an offer by a responsible person of ten per cent more than that named in the return must be made.



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The provisions of that section clearly contemplate that the offer there referred to must be made in the probate court at the time of the hearing of the confirmation, and not a long time after said hearing and after an appeal has been taken to the district court. And there must be evidence showing that the proceedings were unfair and that the sum bid was "disproportionate" to the value of the claim at the time the bid was made. There is not a particle of evidence showing, or tending to show, that the sale to McGregor was unfair or that his bid was disproportionate to the value of the mining claims at the time he made his bid. While the evidence shows that the claims have not increased in value, it also appears that McGregor has expended more than \$200 on said claims in doing assessment work and otherwise improving them. This amount which he has expended in good faith on the claims he would certainly be entitled to recover from the estate, provided his sale is not confirmed, and adding the amount he has expended to the amount of his bid, \$1,675, with interest on such money, it would equal, if not exceed, the amount bid by Jensen. It thus appears that said estate would not realize any more, if as much, out of the amount bid by Jensen as it would out of the bid of McGregor.

Said sec. 5520 is identical with sec. 1552, Kerr's Code of Civil Proc., California, under the provisions of which *In re Leonis' Estate*, 138 Cal. 194, 71 Pac. 171, was decided by the supreme court of California. In that case, after proper order and notices had been made and given, the bid of one Andrada, the appellant therein, being the highest bid received, was on January 25, 1902, accepted and the property sold to him subject to the confirmation by the court. On March 5, Irma and Marie Leonis appeared and objected to the confirmation of the sale, and on March 12th further objections were filed, most of which are identical with the objections filed in the case at bar, and upon the hearing, confirmation of the sale was denied and an appeal was taken from that order. The supreme court, in rendering the decision in that case, said:

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“The appellant had become the purchaser of the property subject to the supervision of the court, and certainly had rights which could not be lightly thrown aside or disregarded. He was responsible for the amount of his bid and might have been compelled to stand by it. Even if the property had depreciated in value or become valueless after the bid and before the confirmation, this would not relieve him; and, while he had assumed certain obligations as a purchaser, he obtained certain legal rights which are to be as much protected and enforced as the rights of other persons.”

As stated in that case, the purchaser in the case at bar was responsible for the amount of his bid and might have been compelled to stand by it even if the property had depreciated in value, and by making his bid, he assumed certain obligations and obtained certain legal rights which the court must protect and enforce the same as the rights of other persons. As above stated, the administrator requested Nels C. Jensen to bid for said property at the time of the sale to McGregor, but he absolutely refused to do so, and now for the district court to permit him to come in on appeal, nearly two years thereafter, and become the purchaser of the property upon the evidence adduced at this trial, would be most unjust and inequitable to McGregor.

The judgment of the district court is reversed and the cause remanded, with instructions to affirm the order of the probate court in confirming the sale of said mining claims to McGregor. Costs of this appeal are awarded to the appellant.

Ailshie, J., concurs.

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Argument for Appellants.

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(June 17, 1910.)

GEORGE A. RICHARDSON, Respondent, v. JOSEPH D. BOHNEY et al., Appellants.

[109 Pac. 727.]

TRANSCRIPT—MOTION TO STRIKE AND SUBSTITUTE—PRINTING TRANSCRIPT—RULES OF COURT—APPEAL FROM ORDER—AMENDMENT OF ORDER AFTER APPEAL—JURISDICTION OF COURT.

(Syllabus by the court.)

1. It is the duty of counsel to have their transcripts on appeal printed in accordance with the rules of the court.

2. After an order refusing to settle a bill of exceptions has been appealed from, it is then too late for the trial court to amend such order, as it loses jurisdiction in the matter when the appeal is taken. In such case a motion to substitute an amended order for the original will be denied.

3. The preparation and settlement of a statement or bill of exceptions is a proceeding within the meaning of the term "proceeding" as used in sec. 4229, Rev. Codes.

4. Where application is made to the court to settle a bill of exceptions after the time has expired for serving the same, on the ground of mistake, inadvertence or excusable neglect, and the court finds that the bill was not served in time by reason of mistake, inadvertence, surprise or excusable neglect, it is the duty of the court to grant relief from such default.

5. Where an appeal is taken from an order, the trial court has no jurisdiction to change or correct such order after the appeal therefrom has been taken, at least until the case is remanded and jurisdiction is again obtained.

APPEAL from the District Court of the Sixth Judicial District, for Fremont County. Hon. J. M. Stevens, Judge.

Application to have a bill of exceptions settled. Denied. *Reversed.*

J. D. Millsaps, for Appellants.

A bill of exceptions is a proceeding within the meaning of sec. 4229, Rev. Codes, which is identical with sec. 473, Code of Civil Procedure of Cal. (*Lukes v. Logan*, 66 Cal. 33, 4

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Pac. 883; *Irwin v. Bank*, 6 Ohio St. 86; *Wilson v. Allen*, 3 How. Pr. 371; *Rich v. Husson*, 1 Duer, 620; *Wilson v. Macklin*, 7 Neb. 52; *Strong v. Hardenburgh*, 25 How. Pr. 438; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Vinston v. Los Angeles Ry. Co.*, 147 Cal. 479, 82 Pac. 53; *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114; *Sandstrom v. Smith*, 11 Ida. 779, 84 Pac. 1060.)

Soule & Soule, for Respondent.

If the time for the preparation and service of a bill of exceptions has expired, the court has lost jurisdiction to extend that time, and it cannot under any circumstances be extended. (*Sandstrom v. Smith*, 11 Ida. 779, 84 Pac. 1060; *Hoehnan v. New York Drygoods Co.*, 8 Ida. 66, 67 Pac. 796; *Simpson v. Pioneer Irr. Dist.*, 17 Ida. 435, 106 Pac. 1.)

Ignorance of the law is no excuse. The courts in the following cases refused to relieve laymen from a condition caused by ignorance of law. Why, then, relieve a member of the bar? (*Chase v. Swain*, 9 Cal. 130; *Dusy v. Prudom*, 95 Cal. 646, 30 Pac. 798; *Harper v. Mallory*, 4 Nev. 447; *Chaffin v. Fulkerson*, 95 Ky. 277, 24 S. W. 1066; *Beekman v. Franker*, 3 Caines, 95; *Abrams v. Virginia F. Ins. Co.*, 93 N. C. 60; *Sherman v. Jorgenson*, 106 Cal. 483, 39 Pac. 863.)

When it subsequently is made to appear to the trial court that an order has been made or entered which does not correctly state his decision, he has authority to correct it. (*Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37; *O'Brien v. O'Brien*, 124 Cal. 422, 57 Pac. 225; *Canadian A. M. & T. Co. v. Clarita L. & L. Co.*, 140 Cal. 672, 74 Pac. 301.)

SULLIVAN, C. J.—This is an appeal from an order made by the trial judge denying defendants' motion to settle, allow and certify the defendants' proposed bill of exceptions with amendments thereto. Said motion was made on the ground that the failure to serve said bill of exceptions within due time was on account of mistake, surprise, inadvertence and

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excusable neglect of one of the attorneys for defendants. It appears from the record that judgment was entered against the defendants on the 14th day of July, 1909, and that a stipulation was entered into by respective counsel to the effect that either party might have ninety days from the entry of the judgment in which to prepare and serve a bill of exceptions on motion for a new trial, and the proposed bill of exceptions was not served upon opposing counsel until the 14th day of October, 1909, two days after the time allowed by said stipulation for serving the same had expired. Counsel for respondent interposed objections to the settlement of said bill of exceptions based on the ground that the same had not been served in time, and also at the same time proposed amendments to said bill. Counsel for appellants thereupon moved the court and served proper notice thereof, on opposing counsel, to the effect that they had made application to the court for an order to settle said bill of exceptions, and that defendants be relieved from the proposed objections to the settlement thereof on the ground of mistake, inadvertence, surprise and excusable neglect as set forth in two affidavits attached to said motion, which were affidavits made by defendants' attorneys.

It appears from said affidavits that the attorney for defendants, who took an active part in the preparation and trial of said cause, prepared the bill of exceptions, and that the same was ready for service some time prior to the time stipulated and agreed upon; that at that time said attorney was extremely busy with other matters and requested his partner to make service of said papers and instructed him how to make such service; that the attorney receiving such instructions had had but little experience in such matters and was not familiar with the practice in regard thereto; that said attorney failed and neglected to make said service within the time stipulated, and when that fact was ascertained by his partner, he served said proposed bill upon opposing counsel, two days after the stipulated time had expired.

The trial judge upon the showing made by said affidavits denied the motion and refused to settle said bill. It ap-

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pears that no written order was made at the time said motion was denied, but thereafter the attorneys for appellants prepared an order and sent it to the judge for his signature, and it was signed by the judge. Said order is as follows:

“In the matter of the motion and application to the court, by the defendants, asking that the bill of exceptions, on appeal in the above-entitled action, with the amendments proposed thereto, be settled, allowed and certified, and thereupon filed with the clerk of said court, and that said defendants be relieved from the objection reserved by the plaintiff, on the ground of mistake, inadvertence, surprise and excusable neglect, the court having heard the argument of the attorneys for the defendants in support of said motion and the argument of the attorneys for the plaintiff in opposition thereto, and it appearing to the court that the said bill of exceptions was not served in due season by reason of the mistake, inadvertence, surprise and excusable neglect of one of the attorneys for the defendants, who was charged with the matter of preparing and serving said bill of exceptions, but that the court has no power to relieve the parties from the objections so made by the plaintiff, and the said plaintiff still insisting upon the said objection;

“It is ordered that the said motion be, and the same is, for the reasons aforesaid, hereby denied, and the application for the settlement of the said bill of exceptions is refused.

“Dated this 14th day of December, 1909.

“Filed January 6th, 1910.

“J. M. STEVENS, Judge.”

On the 14th day of January, the appellants served their notice of appeal on the attorneys for respondent and on the same day filed their undertaking on appeal. It appears that a motion was made on January 28, 1910, by counsel for respondent to amend said order denying the application to settle said bill of exceptions, and it appears that said motion was granted by the trial judge. Said amended order denying the application to settle bill of exceptions is as follows:

“In the matter of the motion and application of the defendants asking that the bill of exceptions on appeal in the

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above-entitled action with the amendments proposed thereto be settled, allowed and certified and thereupon filed with the clerk of said court, and that the said defendants be relieved from the objection reserved by the plaintiff to the settlement of the said bill and the court having heard the argument of attorneys for the respective parties in the matter, and having found and decided that the defendants had not shown any lawful excuse for not having served their proposed bill of exceptions on plaintiff within the time agreed upon by stipulation of the parties, and also having denied the said application to settle said bill, and the court having made said decision on the 14th day of December, 1909, and it further appearing to the court that counsel for the defendant prepared an order for the court to sign denying said motion, which said order the court signed on or about the 14th of December, 1909, which was filed with the clerk of said court on the 6th day of January, 1910, and it now appearing to the court that the said order does not correctly state the decision of the court or judge in the premises, said order filed in said cause on the 6th day of January, 1910, is hereby revoked, and it appearing to the court that no sufficient showing has been made by the defendants to authorize the settlement or allowance of the said proposed bill of exceptions of defendants. It further appearing that the court has no power to relieve the defendants from the objections made by the plaintiffs to the settlement of the said proposed bill:

“It is ordered that the said application and motion for the settlement of the said proposed bill of exceptions be and the same is hereby denied.

“Dated at Chambers, Blackfoot, Idaho, this 27th day of January, 1910.

“J. M. STEVENS, Judge.”

Said amended order is not contained in the printed transcript, but is contained in and made a part of a motion made by counsel for respondents to amend the transcript by striking out the original order of the court and inserting said amended order.

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Upon the foregoing facts and the affidavit of O. P. Soule, counsel for respondent now moves to strike said original order from the transcript and insert therein the amended order; and also moves to strike the transcript from the files because it does not comply with Rule 16 of the rules of this court, and on the ground that it is impossible to determine from the transcript when the judgment in this case was entered.

The transcript seems to have been printed with utter disregard of the rules of this court. It is the duty of the attorney to see that his transcript is properly printed. Press of business is not a sufficient excuse for disregarding the rules of the court. We have concluded, however, to pass upon the questions raised on this appeal, and will therefore deny the motion to strike the transcript from the files.

Respondent moves to strike out the order of the judge refusing to settle appellant's bill of exceptions and insert therein the amended order which was made after this appeal was perfected. This cannot be done, for the reason that after an appeal has been taken from an order, the trial judge or court loses jurisdiction of said matter and has no authority whatever to amend the same. (Secs. 4814 and 4817, Rev. Codes.) The motion to substitute the amended order for the original must therefore be denied.

The question is therefore presented to this court whether the judge abused his discretion in refusing to settle said bill of exceptions.

The court having found that said bill of exceptions was not served in due season by reason of the mistake, inadvertence, surprise and excusable neglect of the attorneys for the defendant, we think it was then the duty of the court to settle and allow the bill. This court held in *Sandstrom v. Smith*, 11 Ida. 779, 84 Pac. 1060, that the showing there was not sufficient under the provisions of sec. 4229, Rev. Codes, to bring the appellant within its provisions, thus intimating that if the showing had been sufficient, it would have come within the provisions of said section. However, in that case, the question as to whether a proceeding to settle a bill of ex-



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ceptions came within the provisions of said sec. 4229 was not raised. Sec. 473 of the Code of Civil Proc. of California is identical with said sec. 4229, Rev. Codes, and in several California cases the supreme court of that state has held that a settlement of a bill of exceptions is a proceeding within the meaning of the provisions of that section. (*Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883.) We think the preparation and settlement of a statement or bill of exceptions is a "proceeding" within the meaning of the provisions of said sec. 4229, and its provisions apply to the preparation and settlement of a statement or bill of exceptions. That being true, and the court having found that the failure of appellants to serve their bill of exceptions within the time stipulated was by reason of mistake, inadvertence, surprise and excusable neglect of one of the attorneys for defendants, the court erred in not settling said bill, and the order refusing to settle the same must be reversed and the cause remanded. If the trial court through inadvertence made a mistake in said order, it had the right to correct it so long as it had jurisdiction of the matter; but when the order was appealed from, the court lost jurisdiction, and will have no jurisdiction until the case is remanded from this court.

The order appealed from is reversed and the cause remanded for further proceedings. Costs of this appeal are awarded to the appellant.

Ailshie, J., concurs.

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Points Decided.

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(June 17, 1910.)

MARTIN NADEL, Respondent, v. NEIL CAMPBELL, Appellant.

[110 Pac. 262.]

CERTIFICATION OF FOREIGN JUDGMENT—SUIT ON FOREIGN JUDGMENT—  
JUSTICE'S JURISDICTION—JURISDICTION TO GRANT CONTINUANCE.

(Syllabus by the court.)

1. *Held*, under the facts of this case that a foreign judgment has been certified in substantial conformity with the requirements of secs. 5980 and 5981 of the Rev. Codes and sec. 905 of the Revised Statutes of the United States, and was entitled to be admitted in evidence.

2. Where a summons was duly and regularly served on the defendant and June 12th was named therein as the return date and the defendant failed to appear on the date fixed in the summons for the trial, and his default was thereupon entered and no further action was taken in the case until December 14th following, upon which latter date evidence was introduced and judgment was rendered and entered against the defendant, *held*, that the error committed in continuing the case from June to December was not jurisdictional and did not oust the justice of jurisdiction to hear the proofs and render and enter judgment.

3. Secs. 4701, 4702, 4703 and 4704 of the Rev. Codes of this state prescribe the duties of justices of the peace, and provide the practice to be pursued in the granting of continuances; and while it would be error to grant a continuance different from or in any other manner than provided by these provisions of the statute, such error must be corrected by appeal or direct attack upon the judgment, and is not jurisdictional, and does not divest the justice of jurisdiction to proceed further in the case.

APPEAL from the District Court of the Fourth Judicial District, for the County of Blaine. Hon. Edward A. Walters, Judge.

Action by plaintiff to recover a judgment on a foreign judgment. Judgment for plaintiff and defendant appealed.  
*Affirmed.*

## Argument for Appellant.

R. F. Buller, for Appellant.

In a suit on a judgment rendered in the courts of another state, the judgment sued on may be attacked collaterally for want of jurisdiction. In such suit all jurisdictional questions are open to inquiry. (*Raymond v. Raymond*, 1 Ind. Ter. 334, 37 S. W. 202; *Pond v. Simons*, 17 Ind. App. 84, 45 N. E. 48.)

The statute of Utah provides that the justice may postpone a case on his own motion for not exceeding three days, and that his docket must show every adjournment, stating upon whose application and to what time. Any substantial departure from such statutory provisions and restrictions renders the judgment a nullity. (Abbott's Trial Brief, Civil, 2d ed., sec. 39, and cases cited; *Waldron v. Palmer*, 104 Mich. 556, 62 N. W. 731; *Tomlinson v. Litze*, 82 Iowa, 32, 31 Am. St. 458, 47 N. W. 1015; *Guthrie v. Humphrey*, 7 Iowa, 23; *Harrison v. Sager*, 27 Mich. 476.)

Unauthorized adjournments deprive the justice of jurisdiction. (*Burbanks Hardware Co. v. Henkel*, 76 App. Div. 183, 78 N. Y. Supp. 365; *Dickinson v. Hoffman*, 90 Ill. App. 83.)

A justice's court being one of subordinate and limited jurisdiction created by statute, nothing can be presumed in favor of its jurisdiction, and such jurisdiction must appear affirmatively on the face of the proceedings. (*Garrett v. Murphy*, 102 Ill. App. 65; *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292; *May v. Grawert*, 86 Minn. 210, 90 N. W. 383.)

Where a justice continues a cause indefinitely, he loses jurisdiction, and any judgment subsequently rendered by him in such case is void. (*Murray v. Churchill*, 86 Ill. App. 480; *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366; *Cohen v. Weill*, 32 Misc. Rep. 198, 65 N. Y. Supp. 695.)

If a case is suffered to lie over without any regular adjournment, to be called up at some future and uncertain time, it would be discontinued thereby. (*New Haven v. Rogers*, 32 Conn. 221; *Peck v. Andrews*, 32 Barb. 445; *Miller v. Larmou*, 38 How. Pr. 417; *Liniger v. Glenn*, 33 Neb. 187,

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Argument for Respondent.

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49 N. W. 1128; *Woodworth v. Wolverton*, 24 N. J. L. 419; *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539; *Kayson v. Steele*, 13 Utah, 260, 44 Pac. 1042; *State ex rel. Collier v. Houston*, 36 Mont. 178, 12 Ann. Cas. 1027, 92 Pac. 476; *Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693.)

A construction which treats positive language as merely directory is not to be lightly adopted, and never when it would really make a new law instead of that made by the legislature. (*Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Webber v. St. Paul City R. Co.*, 97 Fed. 140, 38 C. C. A. 79.)

Sullivan & Sullivan, and T. Bailey Lee, for Respondent.

The California and Idaho statutes, especially in the use of "must," with regard to trials before justices of the peace, have been held by the courts of those states to be directory merely. (*Heinlin v. Phillips*, 88 Cal. 557, 26 Pac. 366; *American T. F. Co. v. Justice Court*, 133 Cal. 319, 65 Pac. 742, 978.)

Sec. 632, C. C. P. Cal., as to district courts, is much stronger, but it has been held to be directory only. (*McQuillan v. Donahue*, 49 Cal. 157; *Zimmerman v. Bradford-Kennedy Co.*, 14 Ida. 686, 95 Pac. 825.)

If the trial was not held as provided by statute, it would not render the judgment void, but would be an irregularity, and the judgment would be voidable only upon appeal or review. (*Dunstan v. Higgins*, 138 N. Y. 70, 34 Am. St. 431, 33 N. E. 729, 20 L. R. A. 668.) While there is no presumption of jurisdiction of inferior courts, where jurisdiction has been obtained the same presumption of regularity of procedure arises as in courts of record. (12 Ency. of Pl. & Pr. 673, 729; *Green v. Tower*, 49 Kan. 302, 30 Pac. 468; *Miller v. Zeigler*, 3 Utah, 17, 5 Pac. 520.)

If the judgment was irregular or erroneous, it is not subject to collateral attack. (5 Am. & Eng. Ann. Cases, 464.)

Defendant's remedy was a motion to set aside the judgment or appeal. (Black on Judgments, sec. 170; II Digest,

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Am. St. 2352, and cases given; 4 Digest, U. S. Sup. Ct. 3654, and cases given; 8 Am. & Eng. Ann. Cases, 1138; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. 131, 19 N. E. 848; *Struble v. Malone*, 3 Iowa, 586; *Conway v. Elison*, 14 Ark. 360; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.)

Where a justice of the peace has jurisdiction of the subject matter and the parties, a judgment rendered by him after the expiration of the time fixed by statute, if erroneous, must be corrected by a direct proceeding for that purpose. (*Gould v. Loughran*, 19 Neb. 392, 27 N. W. 397; *Liniger v. Glenn*, 33 Neb. 191, 49 N. W. 1128; *Talbot v. Kuhn*, 89 Mich. 30, 28 Am. St. 273, 50 N. W. 791.)

California has a section similar to that of Utah, affecting postponements. "A justice's court does not divest itself of jurisdiction to proceed further in the action because, of its own motion, it continues a case until some future time. Such rulings are at most only error, reviewable only by appeal to the superior court." (*Disque v. Herrington*, 139 Cal. 1, 72 Pac. 336.)

"A court of equity will not relieve a party where he has had a plain, speedy and adequate remedy at law, which, by his own negligence, he has not availed himself of. The justice's court obtained jurisdiction of the person of the appellant by service of summons, and having once obtained jurisdiction, his jurisdiction continues until the action is legally disposed of." (*Pressley v. Dean*, 10 Ida. 377, 79 Pac. 71.)

AILSHE, J.—This action was instituted in Blaine county to recover a judgment on a judgment that had been rendered on the 14th day of December, 1901, in the justice's court of Salt Lake county, Utah, for the sum of \$226.80 and costs. Judgment was entered for the plaintiff and the defendant has appealed. Two questions have been presented by this appeal; first, the sufficiency of the certification of the original judgment entered in Utah, and, second, the jurisdiction of the justice to enter the Utah judgment.

As to the first question the record shows that the transcript of the judgment was certified by J. B. Moreton, as

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clerk of the city court of Salt Lake City. This in turn is certified by J. J. Whitaker, as presiding judge of the city court of Salt Lake City, to the effect that the city court is a court of record and that Moreton is the qualified and acting clerk of the city court, and that his signature to the transcript is genuine and that his certificate is in due form. The certificate by the judge is in turn certified by the clerk to the effect that Whitaker is the judge of the city court, and that his signature to the certificate is genuine and his true signature. Then follows a certificate from Margaret Zane Witcher, county clerk of Salt Lake county and ex-officio clerk of the district court in and for Salt Lake county, who certifies that Gustave Kroeger, before whom the judgment was rendered, was at the time duly qualified and acting justice of the peace in and for Salt Lake county, state of Utah, and that the city court of Salt Lake City is the legal successor of said justice's court, and that the seal of the city court appearing on the certificate and the transcript is the true and genuine seal of the city court, and that J. B. Moreton is the clerk of such court and J. J. Whitaker the judge of such court. This in turn is followed by a certificate from Charles S. Tingey, secretary of state of the state of Utah; in which he certifies that Margaret Zane Witcher was at the time of making this certificate the duly elected, qualified and acting clerk of Salt Lake county, Utah. In connection with this transcript and the several certificates, the plaintiff also introduced chapter 109 of the Utah Session Laws of 1901, creating the city court of Salt Lake City and abolishing the local justice's courts, and declaring the city court the lawful successor of the justice's court.

Without a review of the authorities, we are satisfied to hold that this judgment was duly and regularly certified in conformity with the requirements of secs. 5980 and 5981 of the Rev. Codes of this state and sec. 905 of the Revised Statutes of the United States. It must be remembered that in this case the justice's court in which the judgment sued upon had been rendered had been abolished prior to the commencement of this action. It was, therefore, impossible to

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secure a certification of the judgment by the justice of the peace. It was proper, therefore, to have the certification come from the custodian of the docket and records of the justice's court which rendered and entered the judgment. The certification in this case was a substantial compliance with the requirements of the statute.

The next question is attended with more difficulty. It is insisted by appellant that the justice of the peace lost jurisdiction to render and enter a judgment and that the judgment is upon its face void. This contention grows out of the following state of facts: The complaint was filed before the justice of the peace, Gustave Kroeger, on the 31st day of May, 1901, and summons issued on the same day. On June 3d summons was returned duly served. On June 12th, the date named in the summons as the day for trial, the following docket entry was made: "Defendant having been duly served with summons and having failed to appear and answer and the time to answer having expired, upon motion of plaintiff the default of defendant is hereby duly entered by the court." No further entry appears until December 14, 1901, upon which date the following entry appears to have been made: "F. G. Luke was sworn and testified on part of the plaintiff. From the evidence I find that the defendant is indebted to the plaintiff in the sum of \$226.80. It is therefore ordered and adjudged that plaintiff have and recover from defendant the sum of two hundred and twenty-six and 80/100 dollars, and costs taxed at \$3.40."

While the docket does not affirmatively show that a request was made for a continuance or that a continuance was granted by the justice, still it does show that no action was taken after the default was entered on June 12th until proofs were made and judgment entered on December 14th. The presumption would arise, however, from this record that a continuance was granted.

The statutes of Utah governing justice's practice in that state have been introduced and correspond with the statutes of this state as follows: Secs. 3709, 3710, 3711 and 3712 of the Comp. Laws of Utah correspond identically with secs.

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4701, 4702, 4703 and 4704 of the Rev. Codes of this state. We shall, therefore, make our further reference to the sections of the Revised Codes of Idaho rather than refer to the corresponding sections of the Utah statute under which this judgment was entered. It may also be observed in this connection that sec. 3726 of the Comp. Laws of Utah is the same as sec. 4728 of our Code, which in turn is identically the same as sec. 892 of the Code of Civil Procedure of California.

Sec. 4701 of our Rev. Codes provides that the trial in the justice court must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, unless the case be postponed as provided by statute. In this case it is established by the record that the defendant did not appear at the time designated in the summons for his appearance and thereupon his default was entered by the justice. Sec. 4702 of our Rev. Codes provides that the court may of its own motion postpone the trial of a case, "For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action; or, for not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary; or, for not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded." Sec. 4703 of our Rev. Codes is as follows: "The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties." Sec. 4704 authorizes a justice upon application and proper showing by either party to continue the trial of a case "not exceeding four months." Appellant contends that these provisions of the statute are mandatory, and that a continuance beyond the time specified ousts the justice of jurisdiction to take any further action in the case.

The question then presented to us is one of jurisdiction rather than one of error. It may, and indeed must, be conceded that it is error for a justice of the peace to continue the trial of a case for a period exceeding that prescribed by the statute. But the question recurs: Is the commission of



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such an error one that goes to the jurisdiction of the court, or is it one that the court has jurisdiction to commit?

In California, the supreme court of that state has had occasion to construe the provisions of sec. 892 of the Code of Civil Procedure, which is the same as our sec. 4728, which reads: "When the trial is by the court, judgment must be entered at the close of the trial," and has held that this statute is directory and not mandatory. (*American T. F. Co. v. Justice Court*, 133 Cal. 319, 65 Pac. 742, 978; *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366.) In the *American Type Founders* case, *supra*, the supreme court of California held that sec. 892 of the Code of Civil Procedure does not prohibit a justice of the peace taking the case under advisement after the close of a trial and afterward rendering his judgment.

In *Disque v. Herrington*, 139 Cal. 1, 72 Pac. 336, the California court held that errors committed by a justice of the peace in granting or refusing continuances are only errors reviewable on appeal, and do not divest the court of jurisdiction.

In *Zimmerman v. Bradford-Kennedy Co.*, 14 Ida. 686, 95 Pac. 825, a complaint was filed before a justice of the peace. It appeared that a summons was made returnable on the 12th day of June but that the defendant failed to appear. No action whatever was taken until the 15th of June, when proofs were submitted and the judgment was entered. In passing upon that question, this court said: "The objection that is made here is that the case was not postponed from the 12th to the 15th, and that the court therefore lost jurisdiction. This was at most an irregularity which did not go to the jurisdiction of the court. In other words, the fact that proofs are not made or judgment entered on the return day named in the summons does not *ipso facto* oust the court of jurisdiction. By that act alone the court does not lose jurisdiction of the action."

When a defendant fails to appear either at the time fixed in the summons as the hour for the trial or at any time thereafter prior to the submission of proofs and entry of judgment, he places himself in the legal attitude and *status*

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of one who admits the facts charged against him, and consents to the plaintiff having the relief sought against him. If errors of law are committed in the manner of securing and entering the judgment against him for that relief, he has an adequate remedy by direct attack upon the judgment; but he should not, on the other hand, be allowed to lapse into silence for an indefinite period of time and until the plaintiff seeks to renew the judgment or collect the same, and then in a collateral way attack the jurisdiction of the court because of some error at law committed in the rendition of the original judgment. We think the error is not jurisdictional, and therefore would not oust the justice of his jurisdiction to enter the judgment sued upon. It is conceded that the justice originally had jurisdiction of the subject matter, namely, of a debt of the kind and amounting to the sum that was sued upon in this case. The continuance of the case did not in any way change the subject matter. The court, on the other hand, had acquired jurisdiction of the person of the defendant by legal service of process. The defendant defaulted, thereby admitting the charge made against him. The postponement of the case until a future date did not divest the justice of the jurisdiction of the person of the defendant who had already been served.

We are not unmindful of the cases that have been cited by appellant to the contrary. Indeed, many courts have held that an error of this kind committed by a justice of the peace is jurisdictional and divests the justice of the jurisdiction to proceed further or enter a judgment. Prominent among these cases is that of *State ex rel. Collier v. Houston*, 36 Mont. 178, 92 Pac. 476, 12 Ann. Cas. 1027, in which the supreme court of Montana held that the provisions of sec. 1623 of the Code of Civil Procedure of that state, which is identical with sec. 4728 of our Rev. Codes, to which reference has just been made, are mandatory, and that a justice of the peace who took a case under advisement after the proofs were submitted and without the consent of both the parties to the action thereby lost jurisdiction to render a judgment in the case. A large number of cases are cited in the opinion of the court in that case supporting the conclusion reached by

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that court. Notwithstanding the high standing of that court for legal ability and learning, we think the logic of the opinion is faulty, and we cannot give our assent to the conclusion there reached. For instance, it is there said that "the losing party may desire to pay the judgment and thus prevent accruing costs, or he may wish to appeal and be able at the time to perfect it, whereas if the decision is delayed he may be put to further trouble and expense." Now, it occurs to us that a defendant can as readily pay the debt before the rendition and entry of judgment as he can afterward. He can either pay it to the creditor or the justice. He can readily ascertain whether judgment has been entered against him, and if the court has committed an error he has a speedy and adequate remedy. If the court has failed to render his judgment, he likewise has an adequate remedy to compel the justice to act. It is impossible, by any rule of law as to jurisdiction or its exercise, to prevent a justice of the peace from sometimes committing error and this is true of higher courts. The law, however, provides a method for review and correction of errors. The rights of the plaintiff, on the other hand, should not be overlooked. He is the creditor. He is seeking to collect that which he claims is due him. The fact that the justice of the peace before whom he is proceeding commits an error to which attention is not called on account of the absence of the defendant should not defeat the plaintiff's rights of recovery and put him to the trouble and expense of prosecuting a new action and incurring the risk of being unable to secure another service of process.

Other authorities holding to the same effect as the Montana decision have been cited by appellant as follows: *Abbott's Trial Brief*, Civil, 2d ed., sec. 39; *Waldron v. Palmer*, 104 Mich. 556, 62 N. W. 731; *Tomlinson v. Litze*, 82 Iowa, 32, 31 Am. St. 458, 47 N. W. 1015; *McKenna v. Murphy*, 53 Am. St. 695; *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539; *May v. Grawert*, 86 Minn. 210, 90 N. W. 383.

The judgment should be *affirmed*, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, C. J., concurs.

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Points Decided.

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(June 21, 1910.)

OTIS BROWN et al., Respondents, v. E. B. BROWN, Appellant.

[110 Pac. 269.]

BOUNDARY LINE—HOW ESTABLISHED—TITLE BY ADVERSE POSSESSION—  
EVIDENCE—INSUFFICIENCY OF—FINDINGS OF FACT—ACQUIESCENCE.

(Syllabus by the court.)

1. Under the provisions of sec. 4043, Rev. Codes, to obtain title by adverse possession, the land is deemed to have been possessed and occupied in the following cases, only: "1. Where it has been protected by a substantial inclosure; 2. Where it has been usually cultivated or improved. *Provided, however,* That in no case shall adverse possession be considered established under the provisions of any sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law."

2. *Held*, that the evidence in this case is not sufficient to support the findings of fact to the effect that the division line fence has been regarded by all of the parties concerned or interested in said boundary line as the true and correct boundary line and acquiesced in as the true and correct boundary line.

3. *Held*, that the facts of this case do not bring it within the rule laid down in the case of *Bayhouse v. Urquides*, 17 Ida. 286, 105 Pac. 1066.

4. Acquiescence in the maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to a boundary line, but is not conclusive evidence, and will not overcome a positive agreement or understanding that after the true line is established, the fence will be made to conform to it.

5. Where one seeks to procure title to another person's land under the rule of long acquiescence or adverse possession, he must establish his right by clear and satisfactory evidence.

APPEAL from the District Court of the Third Judicial District, for the County of Ada. Hon. Fremont Wood, Judge.

Action to quiet title to real estate. Judgment for plaintiffs. *Reversed.*

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Argument for Respondents.

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Good & Adams, for Appellant.

The evidence in this case shows that the possession of the plaintiff and her grantors was by agreement and under license and permission of the defendant's predecessors in interest and grantors, and it matters not whether the same stood on the line forty years or any number of years, the title of plaintiff could not ripen, as against the defendant and his grantors, into a prescriptive title. (1 Cyc. 1030; *Jensen v. Hunter* (Cal.), 41 Pac. 14; *Nieto v. Carpenter*, 21 Cal. 455.)

Where owners of adjacent tracts, being ignorant of the location of the true line, occupy up to a line which they agree is merely provisional and to continue only until the true line is thereafter determined, neither can acquire title to any land not within the true line. (*Peters v. Gracia*, 110 Cal. 89, 42 Pac. 455; *Calanchina v. Bransteter*, 84 Cal. 249, 24 Pac. 149; *Quinn v. Windmiller*, 67 Cal. 461, 8 Pac. 14; *Irvine v. Adler*, 44 Cal. 559; *McNamee v. Moreland*, 26 Iowa, 96; *Bunce v. Bidwell*, 43 Mich. 542, 5 N. W. 1023; *Bryson v. Slagle*, 44 N. C. 449; *Lowe v. Cunningham* (Tenn. Ch.), 39 S. W. 1052; *Thompson v. Slater* (Tex. Civ. App.), 34 S. W. 357; *Russell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358.)

For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied only in the cases specified in sec. 4043, Rev. Codes. (*Brose v. Boise City R. etc. Co.*, 5 Ida. 694, 51 Pac. 753; *Central Pac. R. Co. v. Shackelford*, 63 Cal. 261; *S. P. R. Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083; *Swank v. Sweetwater Irr. Co.*, 15 Ida. 353, 98 Pac. 297; *Green v. Christie*, 4 Ida. 438, 40 Pac. 54; *Little v. Crawford*, 13 Ida. 146, 88 Pac. 974.)

W. B. Davidson, and Harry Keyser, for Respondents.

Where the boundaries are doubtful, actual occupation for a number of years up to the line whence the party supposes his land to extend, without any opposition from the adjoining proprietor, is strong presumptive evidence of the true place

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of the line, and the fact that the land was held through a mistake as to the extent of the boundaries will not destroy the adverse character of the holding if the party has occupied and received the rents and profits as his own. (*French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680.)

Where there has been no express agreement, long acquiescence by one in the line assumed by the other is evidence of an agreement. (*Kip v. Norton*, 12 Wend. 127, 27 Am. Dec. 120.) And if continued sufficiently long to give title by prescription, is conclusive evidence. (*Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 Am. Dec. 439.)

"Jury may infer a practical location of the disputed boundary line by agreement from long acquiescence." (*Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Columbet v. Pacheco*, 48 Cal. 395; *White v. Spreckels*, 75 Cal. 610-616, 17 Pac. 715; *Burris v. Fitch*, 76 Cal. 395, 18 Pac. 864; *Bayhouse v. Urquidés*, 17 Ida. 286, 105 Pac. 1066.)

SULLIVAN, C. J.—This action was brought to quiet the title to about 1.81 acres of land situated in Ada county. The complaint is in the usual form of one to quiet title, and prays that the defendant be required to set forth the nature of his claim and that the title be quieted in plaintiffs.

It is alleged in the complaint that there had been maintained a division fence between the lands of plaintiffs and defendant for thirty years, and that said division fence was constructed by one Peter Brown, the predecessor of plaintiffs, and one G. F. Rhodes, one of the predecessors of the defendant, and at the time it was so constructed was established by said Brown and Rhodes as the true and correct boundary line between their respective lands; and it is also alleged that said line fence has been regarded by all of the parties concerned or interested as the true and correct boundary line between said lands for thirty years.

The defendant in his answer denies the material allegations of the complaint on information and belief, and by way of cross-complaint alleges that he is the owner and entitled to the possession of the land in dispute as a part of the N. W.  $\frac{1}{4}$

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of the S. E.  $\frac{1}{4}$ , and also of other lands in the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and a part of lot 3, all in sec. 24, township 4 N., R. 1 E., B. M., in Ada county, which described land includes the land in dispute.

Upon the issues thus made the cause was tried by the court without a jury and judgment entered in favor of the plaintiff as prayed for in his complaint. The court thereafter denied a motion for a new trial and this appeal is from the judgment and order denying a new trial.

The errors assigned go to the sufficiency of the evidence to sustain the findings and that the court erred in entering judgment for the plaintiff.

It appears from the evidence that one Peter Brown, the husband of the plaintiff, Caroline Brown, became the owner of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and all that part of the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  lying south and west of what is known as the Valley Road, and lot No. 4, of sec. 24, tp. 4 north of range 1 E., B. M., as early as 1882.

In 1870, G. F. Rhodes became the owner of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and a part of the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and lot No. 3 of said section 24, consisting of 126 acres of land, and continued to own it until about July, 1906, when he sold and conveyed it to one Len Dobson, and Dobson thereafter conveyed it to Harris and Harris to the respondent, E. B. Brown.

There is no question but that the land in dispute is a part of the N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  and lot 3 of said sec. 24, as per government survey, which land was originally entered and patent procured from the government thereto by the said Rhodes, and the claim of respondents thereto is based upon the fact that the division fence between said land of Brown on the south and east and on the north and west of the Rhodes land was from nine to twelve feet in on the north side of the Rhodes land and 122 feet in on the west side of the Rhodes land, making an area of 1.81 acres in dispute.

In support of their contention, the respondent, Mrs. Caroline Brown, testified that she had resided on the land claimed by the respondents since 1883; that she is acquainted with the Rhodes ranch now occupied by the appellant, E. B.

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Brown; that there was a division fence between the Peter Brown ranch and said Rhodes ranch at the time she first became acquainted with it, part of which was wire and part brush; that that fence had never been changed from that line, but there had been a new fence put on the line, built in the same place the old fence was built, and that is the fence that is now situated there; that it is in the same place the fence was in 1883 when she first knew the land; that her deceased husband, Peter Brown, in his lifetime farmed the Peter Brown ranch up to that fence; that it was cultivated in 1883 and has been continuously since; that Rhodes lived on the adjoining ranch up to five or six years prior to the trial of this action, when he sold the land to one Dobson, that there was never any dispute between said Rhodes and said Peter Brown as to the boundary line between said lands; that each party was occupying up to that time the land on the respective sides of said fence; that the fence was kept in repair by both of the parties.

Another witness testified on behalf of the respondents that he had known said ranch since 1882; that he was employed on that ranch in 1882 and continued to be employed there off and on for about ten years; that he was acquainted with the Rhodes ranch adjoining the Brown ranch; that at the time there was a division fence between said ranches; that it consisted of a wire, a worm and a brush fence; that it was a complete division fence between said ranches; that it looked as though it had been there four or five years; that the division fence now between said ranches stands in the same position and on the same line as the old fence when he first knew the land in 1882, that is, that it looked to the witness to be in just the same place, and he testified as follows: "Any more than, of course, a wire fence, you know, backs up about four feet, I judge"; that the Rhodes ranch was cultivated up to the line fence, that Peter Brown kept up a part of the fence and that Rhodes kept up the other part.

Otis Brown testified on behalf of the respondents that he was the son of Peter Brown; that he was twenty-five years of age and that he had lived on the Peter Brown ranch all



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his life; that he is acquainted with the division line fence; that said fence has been in the place where it now is for twelve or thirteen years, or as far back as witness could remember; that it had not been changed since that time; that the Brown ranch had been cultivated continuously up to the line fence, and that the Rhodes ranch had been cultivated up to the said line fence.

Another witness testified on behalf of the respondents that he had known said ranches since 1882; that he had worked for Peter Brown along in 1882 or 1883, about a month or two and had worked for him a few times since; that at the time he went to work for Brown there was a division fence between said ranches; that said fence consisted of wire and brush; that in 1882 said fence was an old fence; that witness had been on the ranch but very little since fifteen or sixteen years before Brown's death.

That was substantially all of the evidence offered by the respondents.

G. F. Rhodes testified, by deposition, on behalf of the appellant. He testified that he became the owner of the Rhodes land referred to in 1870 and had owned it until about six years prior to July, 1909; that he was well acquainted with the Brown land adjoining on the north and west of the Rhodes land; that witness owned the land mentioned at the time there was a partition fence erected between said ranches; the partition fence running north and south was erected fifteen or sixteen years prior to the trial; when the construction of that fence was arranged for, the only persons present were the witness Rhodes, his son and the said Peter Brown; at that time the son was between fifteen and seventeen years old; that Brown came to Rhodes and wanted to put up a fence and build it on the line, or as near the line as they could; that Brown informed the witness Rhodes that he had seen D. O. Stevenson, a surveyor, in regard to his establishing said division line, but that Stevenson had not the time to do it, and told him that if he would go at noon and run it by the shadow of some one who would stand on the corner, that that would give the north and south line; that they did not

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know where the corner was, but that they guessed at where it was, and the boy stood on the corner, or where Brown and the witness thought it was, and they ran the line by the boy's shadow; that that was the way they arranged to construct the north and south fence; that neither Brown nor witness knew where the line was; that they did not establish the line for the fence running east and west; that Brown put up his part of the fence and that Rhodes built the rest of it; that neither of them knew where the true line was; that they just put the fence there; that witness paid all taxes on the land in dispute during all of said time, including the entire 126 acres in said ranch. Witness also testified that he did not object to the construction of the east and west fence where it was placed; that they did not know where the true line was; that so far as he was concerned, he gave his permission to have the fence erected at that place for the time being; that neither the plaintiffs nor their predecessors in interest at any time paid any taxes on the land in dispute but that witness had paid all such taxes; that they agreed to put the fence where it was placed; that their understanding was they would put it on a true line when the survey was made; that was the understanding between witness and Brown; that so far as witness knew, until recently the line had never been surveyed; that there never was any talk or agreement between witness and Brown that he was to have and receive any portion of the land belonging to Rhodes by reason of the erection of said fence; that they simply agreed to place the fences where they were, and the understanding was that they would have a survey made sometime; that Brown stated he was not satisfied, that he thought the fence was over on his land, but was satisfied to let it remain until a survey could be made.

On cross-examination he testified that the east and west line was probably run between fifteen and eighteen years before Peter Brown died; that witness did not regard the line between the respective lands as the true line, but thought it was somewhere near the line; that there was present when the north and south line was run by the boy's shadow, Brown

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and witness, and the fence was erected by the line staked out by the boy's shadow and from that time on witness left the fence standing on that line; that during all of that time they used that as a division fence between their farms; witness never made any objection to the fence being where it was and never demanded any survey; that he did not claim any of the land lying within the inclosure of Brown's field because he did not know it was there; that when the said fences were erected, he supposed they were somewhere near the line; that the east and west line was run by the Green Meadow ranch, which someone had informed them was on the true line; that neither of them believed at the time said fence was erected that it was upon the true line but that it was somewhere near it; that they just put the fence there until a survey should be made; that neither of them objected to having the fence put where it was; that there was nobody present that the witness knew of when the east and west line was established; that witness was not there; that there was a rail fence there and that witness put up a wire fence on the same line; that he put his wire fence back a little; that witness "hooked on" to Brown's fence and made his part of the east and west division fence; that Rhodes at all times claimed all of the land included in the description of his patent from the government and claimed all of the land that said patent called for.

The son of the last-mentioned witness also testified by deposition that he was thirty years of age; that he was acquainted with the 126 acres of land known as the Rhodes ranch, and also the Peter Brown ranch adjoining; that he remembered when there was a fence erected between the land owned by his father and that owned by Peter Brown; that he was present and assisted in the establishment of the fence; that there was present at that time Peter Brown, witness and his father; that witness remembered seeing them run the line; that witness stood on what was supposed to be the corner, and that they ran the line by his shadow, and that the north and south fence was erected between his father's ranch and the Brown ranch in that way; that they built the fence as

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near as they could, and if a survey was made, if it was not on the true line, it was the understanding that the division line fence would be erected upon the true line; does not remember who built the first part of the east and west fence; that witness was fifteen or sixteen years old when the north and south fence was built; it was stated there that when a survey should be made, they would erect the fence on the correct line.

On cross-examination the witness stated that he did not know anything about when the east and west fence was built, and that there was a rail fence upon the east and west line at the time the north and south fence was erected; that as near as witness could remember, it was about sixty feet in on his father's land and that they moved his father's fence out on Mr. Brown's land; that as near as he could remember, the old rail fence was over on Brown's land; that they did not establish the east and west line and that he did not know when the old rail fence was put there; that they did not establish the north and south fence as being on the true line; that they put up that fence at that time with the understanding that when the true line was established, if the fence was not on it, they would move the fence to the true line; that that arrangement was satisfactory to Mr. Brown until a survey should be made.

The above and foregoing is the substance of all the evidence introduced, except that of a surveyor who had surveyed the lines and made a plat of his survey, which plat was introduced in evidence. Upon the evidence the trial court found that the plaintiffs and their predecessors, for more than twenty-five years, had had possession of and cultivated the strip of land in dispute; that the division fence was constructed by said Peter Brown and Rhodes more than twenty-five years prior to the trial of this cause, and had been in its present position since that time; that it was established by said Brown and Rhodes as the true and correct boundary line between their respective premises, that said fence had been regarded by all the parties concerned or interested as the true and

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correct boundary line between said premises for twenty-five years, and had also been so regarded since it was originally constructed, and that said fence during all of said period had been acquiesced in as the true boundary line between said premises; that the plaintiffs and their predecessors had been in open, notorious, continuous and adverse possession of the land in dispute since said fence was established or originally constructed, and on said findings entered judgment in favor of the plaintiffs, quieting the title in them.

The court evidently did not base its decision upon the ground of title by adverse possession, as under the provisions of sec. 4043, Rev. Codes, to constitute adverse possession and obtain title thereby, the land is deemed to have been possessed and occupied in the following cases *only*:

“1. Where it has been protected by a substantial inclosure.

“2. Where it has been usually cultivated or improved. *Provided, however*, that in no case shall adverse possession be considered established under the provisions of any sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law.”

Under the provisions of that section, one cannot obtain title by adverse possession unless it shall be shown that the land has been occupied and claimed for a period of five years continuously, and that the party or persons, their predecessors and grantors, have paid all taxes, state, county or municipal, which shall have been levied and assessed upon such land according to law. In the case at bar, it appears from the evidence that the respondents have never paid any taxes whatever upon the land in dispute, and that the appellant and his grantors have paid all the taxes legally assessed against said land for more than twenty-five years last past. There is no evidence whatever to sustain the finding of the court to the effect that it was stipulated and agreed between the parties that said partition fences were on the dividing lines between

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their tracts of land. In fact, all of the evidence upon that question is directly contrary to that finding. Rhodes testifies positively that it was never stipulated and agreed or understood that said fences should be the boundary lines marking the land owned by each.

The witnesses for respondents were evidently testifying in regard to the east and west fence when they stated that that fence had been there since 1882 or 1883. That fence is not the one that was referred to as having been established by the shadow of the son of Rhodes, as an east and west fence could not be established in that way. It was the north and south line that was established by the shadow of the son, as it was established at noon. It is clear from the evidence that the north and south fence was built about fifteen to seventeen years ago—at least a fence was constructed on the line as established by the shadow of the son. There may have been a fence there prior to that time, as Mrs. Brown testified that a new fence had been built. The east and west fence no doubt had stood there many years, as Rhodes testified that a part of it was there many years ago and he “hooked on” to that, and extended the line. That fence, as shown by the evidence, was not on a straight line, and was from eight to twelve feet from the true line as established by government survey between said tracts of land.

The history of Idaho shows that very few of the farmers in this state when they first build their fences procure a surveyor to establish the correct boundary lines, and where a line is established, as the evidence shows the division lines were established in this case, with the understanding that when a survey was made and a true line ascertained the parties would place their fences thereon, it would be most unjust and inequitable to hold that they had consented and agreed to make that line the true boundary line, when there was no evidence to that effect introduced on the trial.

Counsel for respondents contend that all of the testimony shows that the division line fence has for more than twenty-five years—and perhaps thirty years—been acquiesced in as the boundary and division line between the respective prem-

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ises. We find no evidence in the record that would justify such a statement or conclusion. Rhodes testified positively that said line was not acquiesced in as the true line, but that the understanding was that the fence should be placed on the true line when it was ascertained by survey.

It is also contended that the testimony of Rhodes and his son as to the agreement in regard to the construction of said north and south fence was completely impeached. We do not understand the evidence in that way. And as we understand it, the north and south fence was not constructed until some fifteen or seventeen years prior to the trial of the case, but that the east and west fence was constructed twenty-five or thirty years prior thereto.

It does not appear that improvements of any value, aside from the value of the fences, have been placed upon the land in dispute, and this case does not come within the rule that where one stands by and permits another to place valuable improvements upon his land and makes no objection thereto, the party who thus stands by is estopped from afterward claiming the land.

The facts of this case do not bring it within the rule laid down in the case of *Bayhouse v. Urquides*, 17 Ida. 286, 105 Pac. 1066. In that case this court in effect held that the evidence was sufficient to show that said fence was in fact on the correct line between the lots mentioned in that case. In fact, one witness testified in that case that said fence was built upon a line in accordance with the stakes of the original survey of said lots, and if that evidence was true, Urquides and his predecessors had paid taxes upon the lot claimed by him as established by the original survey. In the case at bar, it is conceded that said fence is not upon the true line between said tracts as established by the government survey. The decision in the Urquides case might have been different had it appeared that Urquides had within his inclosure a part of the lot claimed by Bayhouse and her predecessors as established by the original survey of said lots and had treated it as such.

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As above stated, it is a well-recognized fact in this state that farmers in building their first division fences do not employ surveyors to establish the true lines, but build their fences with the understanding that when the true line is established, they will conform their fences to it. Such evidently was the understanding in this case as shown by the evidence. The evidence does not support the findings of the court to the effect that the line established by those division fences was understood and agreed to be the true line between said contiguous owners.

Counsel for respondent have cited a number of cases holding that where boundaries are doubtful, actual occupation for a number of years up to the line where a party supposes his land to extend, without any opposition from the adjoining proprietor, is strong presumptive evidence of the true line. But strong presumptive evidence is not enough to overcome positive evidence, and the positive evidence in this case shows the understanding was that when the true line was ascertained, the division fences would be conformed to it. Acquiescence in the location and maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to the true boundary line, but is not conclusive evidence, and will not overcome a positive agreement or understanding that after the true line is established, the fence will be made to conform to it. The evidence does not even tend to show that the defendant and his predecessors in interest ever acquiesced in the proposition that the fence was the true dividing line between their lands.

We agree with counsel for respondents that it is for the court below to decide upon the credibility of the witnesses, but the court, after rejecting the only positive evidence upon the issues, is not permitted to find in favor of the plaintiff without any evidence whatever, and on mere presumption.

In the case at bar, the respondents are endeavoring to have quieted in them the title to certain real estate, the legal title to which is in the appellant. They are endeavoring to procure the title under the rule of long acquiescence or adverse possession, and in order to succeed, they must establish their



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Points Decided.

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right under the well-established rules of law by clear and satisfactory evidence, and that they have not done in this case.

The judgment will be reversed and the cause remanded for a new trial, with costs in favor of appellant.

Ailshie, J., concurs.

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(June 25, 1910.)

JOHN DERN, Appellant, v. NAT OLSEN and ROBERT B. BROWNE, Administrator of the Estate of JOHN LYNCH, Deceased, Respondents; MARY LYNCH, JACOB LYNCH, CY. V. SMITH, NAT OLSEN, ROBERT B. BROWNE, C. K. AH FONG, and MARY E. AULTMAN, Intervenors and Respondents.

[110 Pac. 164.]

STATUTE OF LIMITATIONS—WAIVER OF THE STATUTE OF LIMITATIONS—ACKNOWLEDGMENT OF DEBT—ADMINISTRATOR—WAIVER OF STATUTE OF LIMITATIONS BY ADMINISTRATOR.

(Syllabus by the court.)

1. Under the provisions of sec. 4078 of the Rev. Codes, no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the operation of the statute of limitations, unless the same is contained in some writing signed by the party to be charged thereby.

2. Under the provisions of sec. 4078 of the Rev. Codes, a clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the statute begins to run.

3. Where O. was owing D. a note and mortgage which was overdue but not yet barred by the statute of limitations, and O. wrote D. telling him of a prospective sale of mining property he had in view, and saying, "Now, if I can make this deal will try and get enough money down to liquidate the mortgage you hold against the property," such letter constitutes an "acknowledgment" of a "continuing contract" within the meaning of sec. 4078, Rev.

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Argument for Appellant.

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Codes, and sets a new date from which the statute of limitations begins to run.

4. *Held*, further, that the words, "If I can make this deal will try and get enough money down to liquidate the mortgage," constitute a condition that the debtor proposed to place upon the sale of the property and demand from the purchaser, rather than a condition as to the payment of the debt to his creditor, and did not negative an implied promise to pay at some time even if the sale should not be made.

5. Under the provisions of secs. 5469, 5471, 5461, and 5463 of the Rev. Codes, an administrator of the estate of a deceased person has no power or authority to waive the bar of the statute of limitations so as to set a new date for the statute to begin to run.

6. Under the provisions of sec. 4078, Rev. Codes, an administrator cannot "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations and bind the estate, for the reason that the debt is the obligation of the estate represented by the administrator, and would not be the debt of the party making the acknowledgment or promise and "to be charged thereby."

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action by the plaintiff for the foreclosure of a mortgage. Judgment for defendants and plaintiff appealed. *Reversed*.

Richards & Haga, for Appellant.

It was not necessary that respondents should promise to pay the indebtedness to extend a new date for the statute to commence running as to the mortgage. All that was required was a plain and distinct acknowledgment in writing of the existence of the mortgage. (*Foster v. Bowles*, 138 Cal. 449, 71 Pac. 495; *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40; *Kelly v. Leachman*, 3 Ida. 629-639, 33 Pac. 44; *Tuggle v. Minor*, 76 Cal. 101, 18 Pac. 131; *Cowan v. Magauran*, Fed. Cas. No. 3292; *Kirk v. Williams*, 24 Fed. 448; *Green v. Wagon Road Co.*, 23 Fed. 71, 10 Saw. 625; *Clark v. King*, 54 Kan. 222, 38 Pac. 282; 19 Am. & Eng. Ency. of Law, 295; 25 Cyc. 1335-1337.)

Several letters of a series can be construed together to determine whether there was an acknowledgment. (*Morris v.*

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Argument for Appellant.

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*Carr*, 77 Ark. 228, 91 S. W. 187; *Sears v. Howe*, 80 Conn. 418, 68 Atl. 983, 12 Ann. Cas. 809; *Cleland v. Hostetter*, 13 N. M. 43, 79 Pac. 801; *Willis v. Wileman*, 53 Misc. Rep. 462, 102 N. Y. Supp. 1004; *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579; *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; 3 Wigm. Ev., sec. 2120.)

These letters are a sufficient acknowledgment to fully meet the requirements of the statute. (*Miller v. Kinsel*, 20 Colo. App. 346, 78 Pac. 1075; *Raymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205; *Wise v. Adair*, 50 Iowa, 104; *Bayliss v. Street*, 51 Iowa, 627, 2 N. W. 437; *Jenckes v. Rice*, 119 Iowa, 451, 93 N. W. 384; *Senninger v. Rowley*, 138 Iowa, 617, 116 N. W. 695, 18 L. R. A., N. S., 223; *Elder v. Dyer*, 26 Kan. 609, 40 Am. Rep. 320; *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. ed. 338; *Barnard v. Bartholemew*, 22 Pick. 291; *King v. Davis*, 168 Mass. 133, 46 N. E. 418; *Chidsey v. Powell*, 91 Mo. 625, 60 Am. Rep. 267, 4 S. W. 446; *Devereaux v. Henry*, 16 Neb. 65, 19 N. W. 697; *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579; *Norton v. Shepard*, 48 Conn. 143, 40 Am. Rep. 157.)

The spirit and intent of the Idaho statutes empower the administrator to acknowledge debts of the decedent, not barred at his death. (Woerner's Amer. Law of Administration, sec. 401.)

It is within the discretion of the personal representative to plead the statute. (*In re Huger*, 100 Fed. 805; *Trimble v. Marshall*, 66 Iowa, 233, 23 N. W. 645; *West v. Smith*, 8 How. 412, 12 L. ed. 1135; *Fairfax v. Fairfax*, 5 Cranch, 19, 3 L. ed. 24; Wood's Lim., secs. 188, 190; Woerner's American Law of Adm., secs. 400-402.)

The administrator can toll the statute by an acknowledgment of the debt, by part payment, or by a promise to pay. (*Suhre v. Benton* (Tex. Civ. App.), 25 S. W. 822; *Townes v. Ferguson*, 20 Ala. 147; *Ricketts v. Ricketts*, 72 Tenn. 163; *Jones v. Mitchell's Admr.*, 9 Ky. Law Rep. 858; *Northcutt's Admr. v. Wilkinson*, 51 Ky. 408; *Jordan v. Brown*, 72 Ga.

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Argument for Respondents.

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495; *Foster v. Starkey's Admr.*, 66 Mass. 325; *Pole v. Simon's Admr.*, 49 Md. 20.)

Wyman & Wyman, for Respondents.

Each acknowledgment must be sufficient in itself unaided by others. (*Simrell v. Miller*, 169 Pa. 326, 32 Atl. 548; *Patterson v. Neuer*, 165 Pa. 66, 30 Atl. 748; 25 Cyc. 1339; sec. 4078, Rev. Codes; *Kelly v. Leachman*, 3 Ida. 629, 636, 33 Pac. 44.)

The new promise or acknowledgment referred to in the statutes of this state must be either (1) an unconditional promise to pay the debt; (2) an acknowledgment of the debt from which a promise to pay is to be implied; or (3) a conditional promise to pay the debt accompanied by a sufficient showing that the condition upon which the promise is made to depend has been performed. (25 Cyc. 1325, 1326.)

While the acknowledgment need not be in any particular form, it "must be a direct, distinct, unqualified and unconditional admission of the debt the party is liable and willing to pay; or, if it is qualified and made conditional, then the qualification and condition must be shown to have been performed." (*Pierce v. Merrill*, 128 Cal. 473 (476), 79 Am. St. 63, 61 Pac. 67; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Biddell v. Brizzolara*, 56 Cal. 374; *Finn v. Seegmiller*, 134 Iowa, 15, 111 N. W. 314; *Visher v. Wilbur*, 5 Cal. App. 562, 91 Pac. 412; *Reed v. Interstate Oil Co.*, 41 Colo. 463, 92 Pac. 911; 25 Cyc. 1337-1339; *Hanson v. Towle*, 19 Kan. 273; *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416; *Lawson v. McCartney*, 104 Pa. 356; *Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023; *Chambers v. Rubey*, 47 Mo. 99, 4 Am. Rep. 318; *Wood v. Merrietta*, 66 Kan. 748, 71 Pac. 579; *Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. 749, 76 S. W. 910; *Rodgers v. Robson*, 147 Mich. 656, 111 N. W. 193; *Kelly v. Strouse & Bros.*, 116 Ga. 872, 43 S. E. 280; *Weston v. Hodgkins*, 136 Mass. 326; *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. 1229, 30 L. ed. 1156.)

The rights and duties of administrators are such as are given and enjoined by statute. Their powers are to be found

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there alone. To give an administrator power to remove the bar of the statute of limitations would be found to work irreparable injury to estates and bring intolerable scandal upon their administration. Absolutely no warrant for it is to be found in our laws. (*Grotemkemper v. Bryson*, 79 Ky. 353; *Clayton v. Dinwoody*, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926; *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020; *Huntington v. Bobbitt*, 46 Miss. 528; *Moore v. Hardison*, 10 Tex. 467; *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Seig v. Acord*, 21 Gratt. 365, 8 Am. Rep. 605; *Estate of Fitzgerald v. First Nat. Bank*, 64 Neb. 260, 89 N. W. 813; *Milwee v. Jay*, 47 S. C. 430, 25 S. E. 298; *Thompson v. Peter*, 12 Wheat. 565, 6 L. ed. 730; *Steele v. Steele's Admr.*, 64 Ala. 439, 38 Am. Rep. 15; *Oates v. Lilly*, 84 N. C. 643; *Reay v. Heazelton*, 128 Cal. 335, 60 Pac. 977; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643; *Rector v. Conway*, 20 Ark. 79.)

AILSHIE, J.—This action was instituted for the foreclosure of a mortgage. The note and mortgage were dated at Salt Lake City December 18, 1901, and became due and payable July 1, 1902, at McCornick & Company's bank at Salt Lake City. Certain letters from each of the defendants Olsen and Browne were pleaded by the plaintiff for the purpose of showing that each of the defendants had acknowledged the debt so as to relieve the cause of action from the plea of the bar of the statute of limitations. To this complaint the defendants demurred, alleging as ground for the demurrer that the complaint on its face showed that it was barred by the statute of limitations. The court sustained the demurrer and the action was dismissed. This appeal is from the judgment.

The note and mortgage sued upon were signed by Nat Olsen and John Lynch. Lynch subsequently died, and Robert B. Browne, one of the defendants here, was appointed as administrator of his estate. The question to be decided is whether or not the letters pleaded are sufficient to constitute an acknowledgment of the original contract within the purview

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and meaning of sec. 4078 of the Rev. Codes to take the case out of the operation of the statute of limitations. The defendants by the demurrer relied on sec. 4052 of the Rev. Codes as constituting a bar to the action. That section provides that, "an action must be commenced within five years upon any contract, obligation or liability founded upon an instrument in writing." This action was instituted on the 22d day of May, 1908, or nearly six years after the maturity of the debt.

The letters written by Olsen and pleaded by plaintiff and on which he relies are as follows: On November 24, 1902, he wrote, among other things, "I was in hopes I would make enough out of this run to pay off the mortgage but am sorry to say I did not. The ore did not mill as much as I expected, besides the cost of handling ore up here is high. . . . If I should be able to get a party to take hold and buy, and if I did the first money of course would be paid to you. I don't know what to do now when you foreclose mortgage. I won't have the money to pay and won't be able to get another party interested. I was in hopes you would give me time." This letter, it will be observed, was written more than five years prior to the commencement of this action. The plaintiff must, therefore, rely on the other letters. On June 21, 1903, Olsen wrote the plaintiff in which he discussed his mining operations and a prospective sale, and said: "I suppose that if I do not make a deal of the mine will have to go to work and take out ore and pay off mortgage." On October 26, 1903, he again wrote to the plaintiff, speaking of the mines and a sale he had in view, and said: "Now, if I can make this deal will try and get enough money down to liquidate the mortgage you hold against the property." On June 13, 1906, he wrote plaintiff further discussing the property and its probable value and said: "The first payment on Baltimore mine is due about the middle of October when I hope to pay you."

The question now arises as to whether any one of these letters, commencing with the one of date June 21, 1903, is sufficient to waive the bar of the statute of limitations and

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set a new date for the statute to begin running. There is a great diversity of opinion among the courts as to the nature of a writing which is sufficient to take a given case out of the operation of the statute. We shall therefore confine our consideration of the matter as closely as possible to the specific terms of our statute.

Sec. 4078 of the Rev. Codes of this state provides as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Some difference of opinion has existed among the courts as to whether a statute like the foregoing requires the acknowledgment of the debt to be coupled with a promise to pay the same. Some courts have held that "the acknowledgment which is requisite as evidence of a new or continuing contract must not only be in writing but it must be an unconditional promise to pay the debt." (*Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023; *Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. 749, 76 S. W. 910.) Other courts have taken the position that it is not necessary that the acknowledgment be coupled with a promise to pay, but that it is sufficient if the party to be charged unqualifiedly admits a present and subsisting liability to pay the debt. (*Elder v. Dyer*, 26 Kan. 604, 40 Am. Rep. 320; *Clark v. King*, 54 Kan. 222, 38 Pac. 281; *Cleland v. Hostetter*, 13 N. M. 43, 79 Pac. 801, and cases cited; *Chidsey v. Powell*, 91 Mo. 626, 60 Am. Rep. 267, 4 S. W. 446.) There are still other cases which, while in legal effect they seem to us to be in accord with the line of authorities last cited, yet attempt to hold to a somewhat middle ground between these two extremes. They hold that "to take a debt out of the statute of limitations by reason of an acknowledgment or new promise, it is necessary that it should be an unqualified acknowledgment, not only that the debt was just originally, but that it continues due at the time of the acknowledgment, so a promise to pay can fairly be implied; either an express promise to pay the debt or a conditional promise the condition of which has been performed." (*Weston v. Hodg-*

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kins, 136 Mass. 326; *Kelly v. Strouse & Bros.*, 116 Ga. 872, 43 S. E. 280; *Reed v. Interstate Oil Co.*, 41 Colo. 463, 92 Pac. 911; *Rumsey v. Settle's Estate*, 120 Mich. 372, 79 N. W. 579; 25 Cyc. 1323.)

Our statute is identical with sec. 360 of the Code of Civil Procedure of California, and the supreme court of that state in *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145, has indicated the view that this statute only requires an "acknowledgment," where the acknowledgment was made prior to the running of the statute and while the debt was yet a subsisting "continuing contract." There a distinction was made between the acknowledgment of an indebtedness made before it was barred by the statute and the acknowledgment and promise to pay an indebtedness already barred. The court in that case quotes with approval from *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170, as follows: "There are two ultimate facts that may be proved in the mode prescribed—a continuing contract and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and, when made after the bar of the statute, a new contract is created."

Chief Justice Beatty, commenting on the McCormick case, said: "On principle this distinction must exist. When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new; he merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end by reason of the lapse of the full period of limitation or of a discharge in bankruptcy, a new promise creates a new obligation and is itself the basis of the action. A clear recognition of this distinction reconciles all seeming conflict in the decisions of this court, and demonstrates the essential difference between this case and the case of *Wells v. Harter*, 56 Cal. 342, in which it appears that the action on the principal obligation had been barred before the new promise was made."



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Now, it seems to us that the authorities may be reconciled on the subject of a promise to pay when it is remembered that the acknowledgment of an existing indebtedness, in the absence of a specific refusal to ever pay the debt, necessarily carries with it the implied promise to pay it at some time in the future. This, it seems to us, is just as true in a case of this kind as it is where A purchases goods from B without saying anything about ever paying for the goods. The presumption is that A is an honest man and that when he secures the goods he means to pay for them, and the law raises an implied promise; so when A says to B, "I owe the mortgage you hold against me," the presumption is that he is an honest man and means at some time in the future to pay the mortgage. The law, therefore, raises an implied promise to pay.

It follows, therefore, from this line of reasoning that a clear and definite acknowledgment of the existence of the contract and liability, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay, and this in a large measure reconciles the cases which hold that there must be a promise to pay with those which hold that it is sufficient to have an unqualified acknowledgment of the existing liability. It has been said by some of the courts, however, and particularly by Justice Brewer in *Elder v. Dyer*, *supra*, that the acknowledgment is sufficient if it be unqualified and certain, even though it be coupled with the express declaration that the party will never pay the debt. Now, it is not necessary to go to that extent to meet the facts of this case, and we therefore specifically withhold any expression of opinion as to the law under a state of facts where the debtor might acknowledge the debt and yet specifically refuse to pay it. We are satisfied, however, to hold that a definite acknowledgment of the debt, although nothing is said whatever about ever paying the same, is clearly sufficient under our statute where it is not coupled with any refusal to pay or declaration that the party will not pay or never intends to pay. It should be remembered that under the statute and the holding of the court in this state (*Chemung Mining Co. v. Hanley*, 9 Ida. 794, 77 Pac. 226; *Kelly v. Leachman*, 3 Ida. 629, 33 Pac. 44;

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*McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529), the running of the statute of limitations against the cause of action does not cancel the contract or pay the debt. It merely renders it optional with the debtor to thereafter exercise a personal privilege given him by law to plead the limitation and thereby cut off the remedy which the law affords the creditor. It is merely a statute of repose; it does not presume, as has been held in some states, that the debt has been paid. Notwithstanding the fact that the bar of the statute might appear on the face of the complaint, still the same facts would support a valid judgment unless the bar of the statute is pleaded. Our statute, sec. 4078, provides a method of waiving the right to plead the bar of limitation. This statute recognizes two methods, one an acknowledgment and the other a promise. It also recognizes two kinds of "contract," one a "new" contract and the other a "continuing" contract. This statute would be complete for the purposes of the present action by reading it as follows: "No acknowledgment is sufficient evidence of a continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing, etc." A debt that has not yet been barred by the statute of limitations is undoubtedly a "continuing" contract within the meaning of this statute. An acknowledgment in writing of the existence of such a contract is the acknowledgment of a "continuing contract" within the meaning of this statute, and simply fixes a new date from which the statute of limitations begins to run. It in no respect changes, alters or modifies the original contract; it is simply a waiver of that portion of the statute of limitations which may have run prior to the "acknowledgment." Now, as suggested by Chief Justice Beatty in *Southern Pacific Co. v. Prosser*, *supra*, a somewhat different principle may be involved where the statute of limitations has already run against the debt prior to the acknowledgment or promise to pay.

Turning now to the facts of the particular case in hand, we find that on October 26, 1903, the defendant Olsen in writing plaintiff, in speaking of a prospective sale of some of his

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mines, says: "Now, if I can make this deal will try and get enough money down to liquidate the mortgage you hold against the property." The debt at this time was not barred by the statute and the plaintiff could then have maintained an action. In fact, it was nearly three years thereafter until the cause of action was barred. This was a clear and unqualified acknowledgment that the plaintiff held a mortgage "against the property" owned by Olsen. The apparent condition contained within this statement is not a condition on which the debt was eventually to have been paid, but it was rather a condition Olsen proposed to place upon the prospective sale of his property. He says: "If I can make this deal will try and get enough money down to liquidate the mortgage." This condition was one that he proposed to make upon the purchaser of the property and in no way negatived the presumption that he would raise the money in some other manner in case he failed with this sale. If he succeeded in his sale and in imposing the condition thus suggested upon the purchaser, he proposed to thereupon pay Dern the mortgage held against the property. On the other hand, he does not propose that a failure of this condition should be a refusal to pay the debt, nor does he pretend to say or intimate that he will not pay the debt unless he can make this sale in the manner suggested. This is not a conditional acknowledgment of the debt nor is it a conditional promise. It is an unqualified acknowledgment of the debt with the suggestion of a condition under which he hopes to immediately receive the money with which to pay the debt. We think this acknowledgment sufficient to meet the requirements of the statute. Of course, this would be open to the admission of oral evidence on the part of the defendant to show that the mortgage here referred to was not the mortgage sued upon. Evidence to this effect is admissible under all the authorities. (*Kelly v. Leachman*, 3 Ida. 629, 33 Pac. 44.)

The next question presented in this case is the power and authority of the administrator to waive the bar of the statute of limitations as against the estate represented by him. This claim had never been presented to the administrator by the

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plaintiff, but, in conformity with the provisions of sec. 5470 of the Rev. Codes, he expressly waived all recourse against any other property of the estate except that covered by the mortgage. It appears that prior to the time of the running of the statute of limitations, the debtor Lynch died, and Browne was appointed administrator of his estate. Prior to the running of the statute Browne wrote to the plaintiff making reference to this mortgage and the debt secured thereby. It is now claimed by the plaintiff that this was a waiver of the bar of the statute, and that the administrator has the power and authority to waive the statute of limitations where the claim is not barred prior to the death of the debtor.

Sec. 5469 of the Rev. Codes provides as follows: "No claim must be allowed by the executor or administrator, or by the probate judge, which was barred by the statute of limitations, at the time of the death of the decedent. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the applicant and others, on oath, and hear any other legal evidence touching the validity of the claim." Sec. 5471 of the Rev. Codes provides that, "The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed." It is also provided by sec. 5460 of the Rev. Codes that every executor or administrator must immediately after his appointment give a notice by publishing the same in some newspaper in the county, requiring all persons having claims against the estate to present the same, in the manner prescribed by law. Sec. 5461 provides that the time that shall be expressed in this notice must be ten months after its first publication when the estate exceeds in value the sum of \$1,500, and four months when it does not exceed that sum. Sec. 5463 provides that all claims not presented within the time prescribed by the notice shall be "barred forever."

These provisions of the statute indicate to our minds that it was the intention of the lawmakers to prohibit the administrator in any manner extending the bar of the statute of limitations or to interrupt its running against the debt or

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claim held against the estate he represents. It is claimed, however, by appellant that the insertion of the words "which was barred by the statute of limitations at the time of the death of the decedent" expresses an intent on the part of the lawmakers to prohibit the administrator from renewing or reviving a debt *already barred*, but did not intend to prohibit him *extending the time* that the statute may run against a debt which was *not barred at the time of the death of the decedent*. This statute, standing alone, is subject to the construction claimed for it by appellant, but when read in connection with the other provisions of the statute, it seems to us that the phrase, "at the time of the death of the decedent," must have been added to prevent any confusion arising on account of the provisions of sec. 5471, whereby the time during which there is a vacancy in the administration is to be excluded and eliminated from the running of the statute. That time could not run prior to the death of the debtor, but necessarily runs subsequent to his death, and while the obligation on its face might show that the statute had run against the claim, still as a matter of fact, which is subject to proof, there may have been a long period of time intervening during which there was no administrator or executor to whom the claim could be presented.

This view of the statute is reinforced by the provisions of sec. 4078, which we have heretofore considered in this opinion. That statute provides that an *acknowledgment* cannot take the case out of the operation of the statute "unless the same is contained in some writing signed by the party to be charged thereby." Now, "*the party to be charged*" is the debtor and not his legal representative. (*Hanson v. Towle*, 19 Kan. 282.) There is no personal liability against the administrator or executor for the debts of the decedent. The administrator or executor is only liable in a representative capacity, and in that capacity only to the extent of the assets of the estate. The acknowledgment of a debt or liability under this provision of the statute so as to take it out of the operation of the statute of limitation appeals to the conscience and sense of fair dealing of the debtor. After he

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is dead, his legal representative is purely and solely a legal representative of the estate and not of the person of the deceased. He is purely a business representative, and in no way can represent the conscience or sense of equity and justice of the deceased debtor. When the debtor dies the power and authority to waive the bar of the statute of limitations dies with him, and the conscience and sense of fair dealing to which this statute appeals thereupon loses the medium of expression and action to take the obligation out of the operation of the statute of limitations.

A number of authorities have been cited on this question, and we are aware that a great many courts have held that the administrator may waive the bar of the statute of limitations. That seems to be the general rule in England. These cases, however, rest upon statutes very different from ours. We do not find such a holding from any court where they have statutes the same as or similar to those above quoted. (See 2 Woerner's Law of Administration, sec. 401; *Hanson v. Towle*, 19 Kan. 282; *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482; *Estate of Claghorn*, 181 Pa. 600, 59 Am. St. 680, 37 Atl. 918.) In the case last cited, the supreme court of Pennsylvania, after reviewing the authorities, said: "It will be seen from these most explicit decisions that the personal representative is not answerable for a cause of action not created by the decedent; that if by a new promise he revive a debt already barred, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable." (*Clayton v. Dinwoodey*, 33 Utah, 251, 93 Pac. 728, 14 Ann. Cas. 926. To the contrary effect, see *Preston v. Cutter*, 64 N. H. 467, 13 Atl. 874; *Brown v. Anderson*, 13 Mass. 201; *Suhre v. Benton* (Tex. Civ. App.), 25 S. W. 822; see note to *Schlicker v. Hemenway*, 52 Am. St. 123.)

We therefore conclude that the plaintiff stated a good cause of action against the defendant Olsen, and that as against the administrator and the intervenors the complaint was open to the demurrer on the ground that the cause of action was barred by the statute of limitations. The judgment must therefore be reversed and the cause remanded for further

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Argument for Appellant.

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proceedings, in accordance with the views herein expressed. Costs awarded against the appellant and in favor of the administrator and the intervenors who are heirs of the deceased and creditors of the estate of deceased, and the appellant will be awarded such costs against the respondent Olsen as have necessarily been incurred in prosecuting the appeal against Olsen alone.

Sullivan, C. J., concurs.

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(June 27, 1910.)

STATE, Respondent, v. WILLIAM FULLER, Appellant.

[109 Pac. 257.]

EVIDENCE—SUFFICIENCY OF—ADMISSION OF TESTIMONY—STRIKING OUT TESTIMONY.

(Syllabus by the court.)

1. *Held*, that the evidence is sufficient to sustain the verdict.
2. *Held*, that the court did not err in the admission of certain evidence.
3. *Held*, that the court did not err in refusing to strike out certain evidence.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Defendant was tried and convicted for the crime of grand larceny, which crime consisted of the stealing of a certain mare. *Judgment affirmed.*

D. E. Brinck, and K. I. Perky, for Appellant.

Under the circumstances bearing upon and surrounding this case the probability or improbability, the reasonableness or absurdity of what is represented to have been the conduct of appellant is of controlling importance in determining the

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sufficiency of the evidence to justify the verdict. (*Knowles v. Knowles*, 86 Ill. 1, 8; *Gardner v. Weston*, 18 Iowa, 533, 535.)

D. C. McDougall, Attorney General, O. M. Van Duyn, and J. H. Peterson, Assistants to Attorney General, and F. A. Hagelin, for Respondent, cite no authorities.

SULLIVAN, C. J.—The defendant was convicted of the crime of grand larceny and sentenced to imprisonment in the state penitentiary for twelve years. A motion for a new trial was made and denied. The appeal is from the judgment and order denying a new trial.

The errors assigned go to the sufficiency of the evidence to sustain the verdict and the admission of certain evidence over the objection of counsel for defendant, and the refusal to strike out certain evidence on motion of defendant.

As to the assignment of error in regard to the sufficiency of the evidence, we find upon a careful examination of the evidence that it is amply sufficient to sustain the verdict. Upon the other errors assigned, we find no error in the admission of the testimony referred to in said assignments, and no error in the refusal of the court to strike out certain of the evidence on the motion of counsel for the defendant.

The judgment must therefore be affirmed, and it is so ordered.

Ailshie, J., concurs.



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Points Decided.

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(June 27, 1910.)

FRANK R. FOUCH, Respondent, v. M. A. BATES and  
PARMA STATE BANK, LTD., Appellants.

[110 Pac. 265.]

MOTION TO STRIKE—ACTION FOR AN ACCOUNTING AND TO QUIET TITLE—  
PLEADINGS—ISSUES MADE BY—ANSWER—ADMISSIONS IN—FIND-  
INGS OF FACT—SUFFICIENCY OF—JUDGMENT.

(Syllabus by the court.)

1. Under the provisions of subd. 2, sec. 4556, Rev. Codes, all bills of exceptions settled and filed prior to the rendition of judgment become a part of the judgment-roll, and on an appeal from the judgment, under the provisions of sec. 4818, Rev. Codes, become a part of the transcript. However, where a bill of exceptions is a part of the judgment-roll and not relied upon on the appeal, it may be omitted from the transcript by stipulation of counsel, but will not be stricken from the transcript on motion of respondent.

2. There is no necessity for findings upon immaterial issues nor upon facts alleged in the complaint and admitted by the answer.

3. Findings should be of ultimate facts and not of probative facts; but a finding of probative facts is sufficient if the required ultimate fact necessarily results from the probative facts.

4. *Held*, that a return of a deed by the grantor to the grantee, under the facts of this case, leaves the legal title to the real estate described in the deed in the grantor.

5. *Held*, that the issues tendered by the allegations of the complaint and not denied by the answer in connection with the findings of fact made by the court are sufficient to sustain the judgment.

6. *Held*, that the description of the real estate in the judgment or decree, required to be conveyed by the defendant to the plaintiff, is sufficient.

7. Findings must be liberally construed in support of the judgment.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action for an accounting and to quiet title. Judgment for the plaintiff. *Affirmed*.

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Argument for Respondent.

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Griffiths & Griffiths, and Martin & Martin, for Appellants.

"A judgment must be supported by the verdict or findings in the case, and a judgment which goes beyond the verdict is erroneous." (11 Ency. of Pl. & Pr. 904, par. 10; *Richards v. Scott*, 7 Ida. 726, 65 Pac. 433; *Butte Electric Ry. Co. v. Matthews*, 34 Mont. 487, 87 Pac. 460; *Bowman v. Ayres*, 2 Ida. 305, 13 Pac. 346; *Wuchumna Water Co. v. Ragle*, 148 Cal. 759, 84 Pac. 162; *Karren v. Karren*, 25 Utah, 87, 95 Am. St. 815, 69 Pac. 465, 60 L. R. A. 294; *Village of Hailey v. Riley*, 14 Ida. 481, 95 Pac. 686, 17 L. R. A., N. S., 86; *Leggat v. Blomberg*, 15 Ida. 496, 98 Pac. 723; *Ponting v. Isaman*, 7 Ida. 581, 65 Pac. 434.)

The court must find upon all the material issues in the case, and if it fails to do so, the judgment must be reversed. (*Standley v. Flint*, 10 Ida. 629, 79 Pac. 815; *Sandstrom v. Smith*, 12 Ida. 446, 86 Pac. 416; *Brown v. Macey*, 13 Ida. 451, 90 Pac. 339; *Later v. Haywood*, 14 Ida. 45, 93 Pac. 374; *Leggat v. Blomberg*, 15 Ida. 496, 98 Pac. 723; *Wood v. Broderson*, 12 Ida. 190, 85 Pac. 490.)

A judgment must be specific and certain and such that the defendant may readily understand, and be capable of performing. (*Alexander v. Leland*, 1 Ida. 425; 2 Ency. of Pl. & Pr. 933; 23 Cyc. 671, and cases cited.)

The findings of fact upon which the judgment is based must be sufficiently comprehensive, certain and consistent to sustain the judgment, and justify it as a matter of law, and cannot be aided by the evidence. (23 Cyc. 822; 8 Ency. of Pl. & Pr. 941.)

Where the finding of facts is contradictory and uncertain, and the intention of the court cannot be ascertained therefrom, the judgment will be reversed. (*Frederickson v. Deep Creek Irr. Co.*, 15 Ida. 41, 96 Pac. 117; *Whalen v. Stuart*, 194 N. Y. 495, 87 N. E. 819.)

Rice, Thompson & Buckner, and Smith & Scatterday, for Respondent.

Findings should be reconciled and harmonized whenever possible, and should not be declared contradictory, except

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where absolutely necessary. (*Schultz v. McLane*, 93 Cal. 329, 28 Pac. 1053; *Jacks v. Este*, 139 Cal. 507, 73 Pac. 247; *Heaton-Hobson etc. v. Arper*, 145 Cal. 285, 78 Pac. 721.)

When the facts admitted in the pleadings and findings of fact made by the court sustain the judgment, the judgment will not be set aside because the findings alone do not sustain the judgment. (*Bank v. Lake View Town Co.*, 4 Cal. App. 630, 89 Pac. 360.)

Findings are not necessary when the facts are admitted or denied in the pleadings. (*Fox v. Fox*, 25 Cal. 588; *Burnett v. Stearns*, 33 Cal. 468; *Gruhn v. Stanley*, 92 Cal. 86, 28 Pac. 56; *Walker v. Brem*, 67 Cal. 599, 8 Pac. 320; *Taylor v. Central Pac. R. Co.*, 67 Cal. 615, 8 Pac. 436; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.)

The redelivery of a deed by a grantee to the grantor, even with the intention to reinvest the grantor with title, does not reconvey any title to the grantor. (*Zoerb v. Paetz*, 137 Wis. 59, 117 N. W. 793; *Slaughter v. Bernards*, 97 Wis. 184, 72 N. W. 977; *Walker v. Renfro*, 26 Tex. 142; *Bailey v. Campbell*, 82 Ala. 342, 2 So. 646; *Jeffers v. Philo*, 35 Ohio St. 173; *Cranmer v. Porter*, 41 Cal. 462; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. 478, 28 S. W. 490; *Hyne v. Osborne*, 62 Mich. 235, 28 N. W. 821; 9 Am. & Eng. Ency. of Law, 2d ed., 164, and cases there cited; *Miser Gold Min. & Mill. Co. v. Moody*, 37 Colo. 310, 86 Pac. 335.)

SULLIVAN, C. J.—This action was brought for an accounting and to quiet title to certain real estate described in the complaint. After alleging the corporate existence of the Parma State Bank, the complaint alleges that on or about the 31st of August, 1895, the plaintiff conveyed to the defendant Bates, in trust, certain real estate (describing it as per government survey), excepting a tract thereof alleged to have been conveyed to one James B. Mansell, comprising about one acre; also excepting a part of said land conveyed to the Oregon Short Line Railway Co. comprising about one acre; that at the time the said property was so conveyed to the defendant Bates, it was encumbered by a mortgage to the

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state of Idaho as security for the payment of the sum of \$2,000; that in the month of October, 1899, the said Bates and his wife executed and delivered to the plaintiff a deed reconveying to him said real estate and thereby terminated said trust; that in the month of February, 1900, the plaintiff returned said last-mentioned deed to the defendant Bates, under and by virtue of an oral agreement to the effect that said defendant Bates should sell portions of the property and the purchase price obtained therefor should be applied on the mortgage debt above referred to, and after said mortgage should have become liquidated, the purchase price of the remaining portions of said property to be so sold by the said Bates was to be divided, two-fifths to Bates and three-fifths to the plaintiff; that on the 20th of February, 1900, the said Bates platted a portion of said land as lots and blocks of the town of Parma, Canyon county; that said Bates filed said plat with the county recorder of said county; that on or about the 26th of January, 1901, said Bates platted another portion of said land as lots and blocks of the said town of Parma and filed said plat with the county recorder; that numerous lots of said real estate so platted were sold under said agreement by said Bates and the proceeds were applied to the payment of said mortgage debt until the mortgage debt was reduced to the sum of \$250; that in the month of June, 1903, said Bates and the plaintiff made an oral agreement in regard to the division of the proceeds of the sale of the then remaining portion of said real estate after said mortgage debt encumbering said property should become liquidated; that after said debt should be liquidated, it was agreed that the remaining portion of said land sold by Bates was to be divided equally, one-half received therefor was to be paid to plaintiff and Bates was to retain the other half; that under said agreement Bates paid said mortgage debt and paid to plaintiff the sum of \$1,100 out of the proceeds of the sale of certain portions of said real estate; that since the last-mentioned agreement the defendant Bates has sold other portions of said real estate, the amount of such sales being unknown to the plaintiff and the proceeds of which have been retained

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by the said Bates and no account of same has been made by him to the plaintiff; that there has been sold by said defendant to various and sundry purchasers certain lots (describing them) of the land so platted; that on the 12th day of November, 1904, the said Bates and his wife executed a deed to the Parma State Bank, one of the defendants, to secure the payment of \$4,341.30, and conveyed by said deed a considerable portion of said real estate (describing a part of it by legal subdivisions and a part by lots and blocks); that upon the receipt of said deed by said bank, it executed to said Bates a contract to reconvey the said property upon certain conditions set forth in such agreement, which contract was attached to and made a part of the complaint; that since the execution of said contract said bank has conveyed to divers purchasers portions of said property (describing it by lots and blocks); that the sum of \$4,341.30, for the payment of which said property was transferred to the bank, is the debt of the defendant Bates and no part of it the debt of the plaintiff; that the amount still due the plaintiff from the proceeds of the sale of portions of said real estate by Bates under said agreement cannot be stated by plaintiff without an accounting between Bates and the plaintiff; and the prayer is that an accounting be had and that the plaintiff have judgment against Bates for the amount found due; that the plaintiff be adjudged to be the owner of the portion of said property now held by said Bates, and that the title of plaintiff to said property be declared and adjudged good and valid as against Bates; that plaintiff be adjudged to be the owner of that portion of said real estate now held by the Parma State Bank, and that said deed to the bank is a mortgage only; that Bates be required to reconvey to the plaintiff by warranty deed that portion of the property now held by him, and for costs.

The bank did not answer. By the answer of defendant Bates, a number of allegations of the complaint are admitted and others denied. The answer admits the return of the deed alleged to have been returned to the defendant by the plaintiff in January, 1900, but denies that said deed was returned to the defendant under the agreement alleged, and avers that

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the plaintiff returned said deed to the defendant for a valuable consideration and with the full intent and purpose of vesting the title to said real estate described therein in the defendant, and that after the delivery of said deed, the plaintiff had no right, title or interest in or to said property or to any part thereof; admits that since the delivery of said deed defendant has sold portions of said property and has paid off a part of the mortgage indebtedness against said property, but denies that the indebtedness was reduced to the sum of \$250 or to any sum less than \$750; denies that in the month of June, 1904, or at any other time or at all, the plaintiff made a new or any oral agreement, or any agreement whatever, with defendant in regard to the division of the proceeds from the sale of the then remaining portions of said property; denies that defendant agreed that after said mortgage debt was liquidated that the remaining portions of said land should be divided equally between the plaintiff and defendant or in any other manner, or that defendant made any agreement with the plaintiff in regard to the proceeds of said property; denies that he paid said mortgage debt, and avers that a large portion thereof was taken up by executing a new mortgage on said property, which new mortgage remains unpaid; admits that defendant had sold portions of said property and had made no accounting to the plaintiff, and avers that he was under no obligation to account to plaintiff for any portion of the proceeds of the sale of such property.

And for a further answer, alleges that the plaintiff on or about the 31st of August, 1895, conveyed to the defendant the property described in paragraph 2 of the complaint; that said property was encumbered by a mortgage of \$2,000, and that defendant reconveyed said property to the plaintiff on the 1st day of May, 1899, by a good and sufficient deed, and that said deed was not placed on record by the plaintiff; that in January, 1900, plaintiff had not paid and discharged said mortgage to the state of Idaho or any part thereof; had failed to pay the taxes assessed against said property, and that said property had been sold to Canyon county for taxes assessed thereon, and that there was an outstanding indebtedness

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which was a lien on said property, including the said mortgage and unpaid taxes, amounting to more than \$3,100; that in the month of January, 1900, defendant purchased from the plaintiff said property described in paragraph 2 of plaintiff's complaint, and the whole thereof, for a valuable consideration, a part of which consideration was that the said defendant would pay and discharge all of the indebtedness which was a lien on said property, and would protect the plaintiff from any deficiency judgment which might be rendered against him on account of said indebtedness; that at the time defendant purchased said property from the plaintiff, instead of plaintiff's executing a conveyance to the defendant therefor, he returned to the defendant the deed theretofore given him by the plaintiff, and that said deed was returned to the defendant by the plaintiff for the purpose and with the full intention of vesting the title of said property in the defendant and conveying to him all of the rights of the plaintiff to said real estate; that in the summer of 1904, plaintiff stated to the defendant that he was poor and in hard circumstances and that the defendant had done well with said property, and asked the defendant to give him some money, and that on account of the relationship and friendship existing between the plaintiff and the defendant at that time the defendant agreed to give plaintiff some money, which should be one-half of the profits on certain lots to be sold, and defendant has since said time given plaintiff certain moneys, but alleges that the same was a gift and was not paid to the plaintiff on account of any agreement which the plaintiff had with the defendant, and that there was no consideration whatever for defendant's promise in that regard, and prays that plaintiff take nothing by his action.

Upon the issues thus made the court appointed a referee to take the testimony and make full and complete findings upon the several issues made by the pleadings, which the referee proceeded to do, and made his return to the court. Counsel for appellants excepted to the findings and decision of the referee, and the exceptions were settled in a bill of exceptions by the district judge.

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It appears that shortly after said bill of exceptions was settled, Judge Frank J. Smith, who was then the district judge of said court, was succeeded by Hon. Ed. L. Bryan, and instead of passing upon the proceedings and findings of the referee, Judge Bryan disregarded them entirely and proceeded to, and did, retry the case himself. It appears that on such trial witnesses were examined and documentary evidence introduced on behalf of the respective parties, and after hearing all of the evidence so presented, the court made its findings of fact, conclusions of law, and entered judgment whereby it was adjudged that the plaintiff and defendant were each an owner of an undivided one-half interest in and to the real estate described in said judgment; that the conveyance executed by Bates to the Parma State Bank in the form of a warranty deed with an agreement back was a mortgage, and that the \$4,341.30 borrowed by Bates from said bank and secured by said mortgage was used for the benefit of said Bates. On the accounting it was also adjudged that the plaintiff was indebted to Bates in the sum of \$893.95, and that the plaintiff could satisfy said indebtedness to Bates by paying said amount to the Parma State Bank on said mortgage; and that Bates should convey to said plaintiff an undivided one-half interest in and to the property described in the decree. It was also adjudged that in case the Parma State Bank, after the payment of such \$893.95 by plaintiff, should be obliged to resort to the property of the plaintiff to secure the complete satisfaction of said mortgage, then and in that event the plaintiff should have and recover from the defendant Bates whatever amount the bank should recover out of plaintiff's interest in said real estate.

The property described in the decree is as follows, to wit:

“The southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter, and the north half of the southeast quarter of section nine, in township five north, of range five, west of the Boise Meridian, in Canyon county, Idaho, excepting one lot deeded to James B. Mansell situated in the said southeast quarter of the northwest quarter, containing one acre, more or less, and one tract of land situated



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in the said northwest quarter of the southeast quarter deeded to the Oregon Short Line Railroad Company, containing one acre, more or less, and excepting also lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of block 27 and lots 1, 2, 3, 4, 5, 6 and 7 of block 26, lots 1, 2, 3, 4, and 5 of block 28, lots 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 of block 34, lots 4, 5, 6, 8, 9, 10, 11 and 12 of block 35, lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of block 37, lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of block 38, lots 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of block 39, lot 11 in block 33, and lots 7 and 8 in block 31, all of said lots and blocks being situated in the town of Parma as designated by the plat of said townsite now on file in the office of the county recorder of Canyon county, Idaho."

This appeal was taken by Bates; the Parma State Bank did not appeal.

Counsel for respondent has interposed a motion to strike out the bill of exceptions containing the order appointing a referee and the proceedings before the referee, for the reason that said bill of exceptions is not relied upon on this appeal and does not affect the questions raised on appeal in any manner. It is provided by sec. 4818, Rev. Codes, that on an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll and of any bill of exceptions or statement in the case upon which the appellant relies. As the bill of exceptions sought to be stricken out was settled before the case was tried, it became a part of the judgment-roll under the provisions of subd. 2 of sec. 4556, Rev. Codes. That subdivision provides that the judgment-roll shall consist of the pleadings, a copy of the verdict of the jury or the findings of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to a change of parties and a copy of the judgment. Since under the provisions of said sec. 4818 the appellant is required to furnish the court, among other documents, the "judgment-roll," it requires the appellant to furnish all the papers of which the judgment-roll is constituted. However, in the case at bar, the bill of exceptions sought to be stricken out consists of about twenty-six

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pages of printed matter and has no bearing upon this appeal whatever, and could have been excluded from the transcript by stipulation of counsel without affecting the questions relied upon on this appeal. As it was not so excluded, it was the duty of the appellant under the statute above cited to include it in the transcript, and for that reason it will not be stricken out on motion.

*In limine*, it will be observed from the issues made by the pleadings as above set forth that plaintiff claims to be the owner of the real estate in dispute, and the defendant by his answer also claims to be the absolute owner of the same. The errors assigned are to the effect that the decree is inconsistent with and not supported by the findings of fact; that the findings and decree are uncertain and indefinite, and do not cover the issues raised by the pleadings; that the decree is contrary to the facts found; that the ninth finding of fact, charging Bates with \$1,236 for rental of house, office, shop, pasture, orchard, etc., is contrary to other findings made by the court, and to the alleged agreement between the parties.

It must be conceded that the findings are not as full and complete as they might have been made, and also that a number of the allegations of the complaint were admitted by the answer, or not denied. The rule is well settled that where the facts admitted by the answer and the findings made by the court sustain the judgment, the judgment will not be set aside, because the findings alone do not sustain the judgment, as findings are not necessary when the facts are admitted in the pleadings; that is, when the answer admits the allegations of the complaint, there is no issue of fact made by the pleadings, and no finding of fact is necessary in such case. (*Fox v. Fox*, 25 Cal. 588; *Walker v. Brem*, 67 Cal. 599, 8 Pac. 320; *Taylor et al. v. Central Pac. R. R. Co.*, 67 Cal. 615, 8 Pac. 436; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.) There is no necessity for findings upon immaterial issues, nor as to material facts alleged in the complaint and not denied by the answer. Findings should be of the ultimate facts and not of the probative facts; still, a finding of probative facts is suffi-

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cient if the court is enabled to say that the required ultimate facts necessarily result therefrom. (*Miller v. Luco, supra.*)

Some question is raised as to the effect of the return of the deed in January, 1900, by respondent to Bates, which deed was executed by Bates and wife to respondent. It is contended that the great weight of authority is to the effect that the return of a deed by a grantee to the grantor, even with the intention to reinvest the grantor with title, does not reconvey any title to the grantor. That may be true as a rule of law, but this case was not tried upon that theory, but was tried upon the theory that Bates held the legal title, and we shall decide it upon the theory on which it was tried.

Some of the objections raised by appellant are with reference to matters which are either admitted by the answer or concerning which no issue is raised by the pleadings. There is no issue raised by the pleadings as to whether or not the Parma State Bank has been paid in full the amount borrowed by Bates from the bank. The complaint alleges that the amount due said bank is a debt of the defendant Bates and that no part of it is the debt of the plaintiff. That allegation is admitted by the answer, and it is now too late for the appellant to contend that possibly the bank has been paid in full. While the court did not find specifically the amount due the bank from Bates, from the findings made, it is clear that Bates was still owing the bank a part, if not all, of that indebtedness, and directed the appellant to pay thereon the amount of \$893.95 found by the court to be due from the respondent to Bates. While no specific finding was made in regard to the indebtedness to the bank, there was no issue in that regard made by the pleadings. The bank admitted all allegations of the complaint by failure to answer.

It is contended that the findings of fact are indefinite and uncertain, and do not cover the issues made by the pleadings in that they fail to show what part of the property which has been conveyed to Bates by respondent has been sold by Bates and the bank. As we understand it, the list and description of property so sold was set out in the complaint in paragraphs 10 and 13. The tracts of land set out and described in the

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complaint as having been sold are all admitted to have been sold, except lot 8 in block 35. There then was no issue raised on that question, except as to lot 8 in block 35.

It is also contended by counsel that the description of the property in the decree does not follow any description in the complaint. We find that the property referred to in the decree is particularly described as above set forth in this opinion, and specifically excepts certain lots and blocks from the operation of the decree and is the property described in the complaint. While the lots referred to as having been conveyed to Mansell and the Oregon Short Line Railway Co. are not specifically described in the decree, from the conveyance to those parties the description of those tracts may be made specific and certain, and the decree is to the effect that respondent and Bates are each an owner of an undivided one-half interest in and to the property described in the decree except the portions thereof that had been sold, as stated in the decree and excepted from its operation. It is not contended that any of the property of which Bates and respondent are decreed to be the equal owners has been sold or conveyed by Bates, and if the court has failed to include in its decree land that ought to have been included, Bates will not be permitted to complain for that reason. If he is not required to convey to respondent some of the property which it is admitted in the answer should be conveyed, respondent is the only man injured.

After a careful review of the whole case, we are of the opinion that the judgment and decree are sustained by the admissions of the answer and the findings of fact.

It is contended that the court erred in charging appellant Bates with \$1,236 for rental value of the house, office, shop, pasture and orchard connected with said premises. There is nothing in this contention, since it is apparent from the record that respondent turned the property over to Bates under a contract that the net proceeds should be divided between the respective parties. If there were \$1,236 realized from said premises for rental on the house, etc., that certainly was a

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Points Decided.

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part of the profits from the premises, and came within the provisions of the contract.

Under the well-established rule that findings should be liberally construed in support of the judgment, we find they are sufficient in this case. There is no question raised as to the sufficiency of the evidence to sustain the findings, but the contention rests principally upon the ground that the findings are contradictory and not sufficient to support the judgment.

We have not taken up and discussed each of the specific errors assigned, but have examined them all, and are satisfied that the judgment of the trial court ought to be sustained, and it is so ordered. Costs are awarded to the respondent.

Ailshie, J., concurs.

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(June 28, 1910.)

GEM IRRIGATION DISTRICT, Respondent, v. J. WALTER JOHNSON, Appellant.

[109 Pac. 845.]

QUALIFICATION OF PETITIONERS FOR ORGANIZATION OF IRRIGATION DISTRICT—HOLDERS OF ENTRYMEN'S RECEIPTS FROM STATE OR GENERAL GOVERNMENT.

(Syllabus by the court.)

1. "The holders of title or evidence of title" or entrymen "on lands under any law of the United States or of this state," who have received receipts or other evidence of their rights as such entrymen, are competent and proper persons to sign a petition for the organization of an irrigation district under the provisions of sec. 2372, Rev. Codes, and such petitioners may be counted in computing the requisite number of signers or holders of title or evidence of title to lands susceptible of irrigation under a common system of irrigation.

APPEAL from the District Court of the Seventh Judicial District, in and for the County of Owyhee. Hon. Ed. L. Bryan, Judge.

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Action by the Gem Irrigation District for confirmation of the proceedings organizing the district. Judgment for the plaintiff and defendant appeals. *Affirmed.*

Smith & Scatterday, for Appellant, cite no authorities.

Rice, Thompson & Buckner, for Respondent.

The statutes expressly authorize the signatures of entrymen so far as making up the number required is concerned. Therefore, whatever is the interpretation of sec. 2372, Rev. Codes, this petition is sufficient, and gave the county commissioners jurisdiction to act. (See *Nevada Nat. Bank v. Poso Irr. Dist.*, 140 Cal. 344, 73 Pac. 1056.)

AILSHIE, J.—This is an appeal from the judgment and order of the district court decreeing and confirming the organization of the Gem Irrigation District. This district was organized under the provisions of sec. 2372 of the Rev. Codes. That section provides as follows:

“Whenever fifty, or a majority, of the holders of title, or evidence of title, to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, or when for other reasons they desire to organize the proposed territory into one district, they may propose the organization of an irrigation district under this title: *Provided*, said holders of title or evidence of title shall hold such title or evidence of title to at least one-fourth part of the total area of the land in the proposed district, which will be assessable for the purposes of the district. The equalized county assessment-roll next preceding the presentation of a petition for the organization of an irrigation district shall be sufficient evidence of title for the purpose of this title, but other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state, and such entrymen shall be competent signers of such petition, and the lands on which they have made such entries shall, for

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the purposes of said petition, be considered as owned by them."

The only question that is argued or presented on this appeal is whether or not the expression "the lands in the proposed district which will be assessable for the purposes of the district" has reference to lands to which the owners or occupants hold title and lands the title to which has passed from the state or the general government, or whether this relates to and is satisfied by the latter part of the proviso to the section, which says, "but other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state." We do not think there is any room for doubt as to what the legislature meant by the provisions of the last sentence of this proviso to sec. 2372. The concluding part of the sentence itself is clear and explicit. It says, "and such entrymen [referring to the holders of the receipts from the state or the general government] shall be competent signers of such petition, and the lands on which they have made such entries shall, for the purposes of said petition, be considered as owned by them." This measures the qualifications of a signer of such petition and the conditions under which he may sign and be counted as one of the number and one whose lands will constitute the required amount to be represented by such petition. The condition is that he shall hold an entryman's receipt, either from the state or the general government, for the lands claimed by him and which he seeks to have included in the district and subject to assessment for the purposes of an irrigation district.

It is equally clear that irrigation bonds issued against such lands would be valid and binding to the extent at least of the title, interest or claim of such entryman in and to such lands, whether acquired by him from the state or the general government. As to what liability the bonds would impose upon such lands beyond and in excess of the interest acquired or held by the entryman is another question, and one that

Points Decided.

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does not concern us in this case. (See *Nev. Nat. Bank v. Poso Irr. Dist.*, 140 Cal. 344, 73 Pac. 1056.)

The judgment of the district court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, C. J., concurs.

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(Jan. 15, 1910.)

**ELISHA STRONG et al., Appellants, v. WESTERN UNION TELEGRAPH CO., Respondent.**

[109 Pac. 910.]

**TELEGRAPH COMPANIES — NEGLIGENCE — RULES AND REGULATIONS — LIABILITY — PUBLIC POLICY — VOID STIPULATIONS — EVIDENCE — ALLEGATION OF NEGLIGENCE — PRIMA FACIE CASE — DEFENSE — NON-SUIT — CONTRACT.**

(Syllabus by the court.)

1. A telegraph company is chartered for public purposes, has the power of eminent domain, is a public agent and exercises quasi-public employment, and is required to perform the duties it was chartered to perform with the same care, skill and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and it is contrary to public policy to permit it by rules and regulations to restrict its liability for damages resulting from its own negligence or carelessness.

2. The reasonableness or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stipulation which exempts such company from damages for its own negligence is void.

3. *Held*, that the evidence in this case shows negligence on the part of the telegraph company, and that the sufficiency of the complaint, not having been challenged by demurrer or upon the introduction of evidence, but being first challenged by a motion for a nonsuit, which is not a ground for a nonsuit, that upon a reversal of this case the plaintiff should be allowed to amend his complaint so as to allege negligence in the transmission of said telegram.

4. The term "gross negligence" is used to denote a degree of carelessness greater than the degree implied by "ordinary negligence," and is sometimes used to denote wilful negligence or fraud.



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Argument for Appellants.

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5. Where a telegraph company fails to transmit a message correctly, the proof of that fact is *prima facie* evidence of the company's negligence.

6. If the failure to correctly transmit a telegram was not the result of the negligence of the company, the means of showing that fact is within the possession of the company, and it may show it as a defense.

7. *Held*, that the evidence shows that said telegram was delivered to the agent of the company for transmission and was accepted by it; that the company made a mistake in its transmission, and that showing made a *prima facie* case in favor of the plaintiff, and the court erred in granting a nonsuit and entering a judgment of dismissal.

8. *Held*, that the contract for the sale of the cattle was made with the commission company.

APPEAL from the District Court of the Fifth Judicial District, for Bear Lake County. Hon. Alfred Budge, Judge.

Action to recover damages for an alleged mistake made by the telegraph company in transmitting a message. Motion for nonsuit was granted and judgment of dismissal entered. *Reversed*.

Thos. L. Glenn, for Appellants.

An error made in a plainly written message, each word distinguishable by the naked eye, is gross negligence, unless some exculpatory evidence is adduced. (2 Joyce on Electric Law, 2d ed., sec. 736; *Western Union Tel. Co. v. Goodbar* (Miss.), 7 So. 214.)

The only defense offered by respondent is that the printed stipulations on the back of the message delivered to respondent by appellants for transmission provided, among other things, that the sender must, to hold the company liable, order the message to be repeated, and pay the company a fee, equal to one-half of the rate for transmission; such stipulations are void as against public policy, and are an outrage on justice.

The usual stipulation as to unrepeated messages is void where the company's negligence is the cause of the damage or loss. (Citing cases found in opinion.)

## Argument for Respondent.

Clark & Budge, for Respondent.

It cannot be said that appellants contracted with the commission company directly, because the parties did not come to a common understanding. There was no meeting of minds as a result of the telegraphic communications. (*Starks Co. v. Brewer*, 77 Kan. 610, 95 Pac. 402; *Perkins Glass Co. v. Pacific C. & T. Co.* (Cal.), 54 Pac. 101.)

The great weight of authority upholds the right of the company to adopt reasonable rules, regulations and conditions to govern the sender of messages, and which shall control in fixing the liability of the company for delays or mistakes in the transmission or delivery of messages which it receives. (*Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883; *Camp v. W. U. Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461; *Coit v. Tel. Co.*, 130 Cal. 657, 80 Am. St. 153, 63 Pac. 83, 53 L. R. A. 678; *Kiley v. Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Grinnell v. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Clement v. W. U. Tel. Co.*, 137 Mass. 463; *Wann v. W. U. Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *Becker v. W. U. Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; *Breese v. W. U. Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Pegram v. W. U. Tel. Co.*, 97 N. C. 57, 2 S. E. 256; *Passmore v. W. U. Tel. Co.*, 78 Pa. 238; *Aiken v. W. U. Tel. Co.*, 5 S. C. 358; *W. U. Tel. Co. v. Smith*, 3 Wills. Civ. Ct. App. (Tex.) sec. 62; *W. U. Tel. Co. v. Hearne*, 77 Tex. 83, 13 S. W. 970; *Womack v. W. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *W. U. Tel. Co. v. Coggin*, 68 Fed. 137; *Birkett v. Tel. Co.*, 103 Mich. 361, 50 Am. St. 374, 61 N. W. 645, 33 L. R. A. 404; *Jacob v. Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Riley v. Tel. Co.*, 8 Misc. Rep. 217, 28 N. Y. Supp. 581; *Wheelock v. Postal Tel. Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *Halsted v. Postal Tel. Co.*, 193 N. Y. 293, 127 Am. St. 952, 85 N. E. 1078, 19 L. R. A., N. S., 1021; *Monsees v. Tel. Co.*, 127 App. Div. 289, 111 N. Y. Supp. 53.)

If negligence is relied upon as a cause of action, it must be alleged. (*Cumberland Telephone & Tel. Co. v. Pierson*,

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170 Ind. 543, 84 N. E. 1088; *Pittsburg etc. Ry. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988; 29 Cyc. 970.)

Appellants simply allege the commission of an error, which so far as we know may have resulted from atmospheric disturbances, or from other cause for which respondent was in no way responsible. If they had alleged negligence in their complaint, they have not proved negligence, but the commission of an error, and such proof in jurisdictions which decline to relieve the company from liability for errors occurring through negligence, as well as in jurisdictions which uphold such stipulations, is not considered sufficient proof of negligence. (*White v. Tel. Co.*, 14 Fed. 710, 5 McCrary, 103; *Becker v. Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; *Tel. Co. v. Hearne*, 77 Tex. 83, 13 S. W. 970; *Sweatland v. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Thompson v. Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; *Halsted v. Tel. Co.*, 193 N. Y. 293, 127 Am. St. 952, 19 L. R. A., N. S., 1021, 85 N. E. 1078; *Womack v. W. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Breese v. Tel. Co.*, *supra*; *Aiken v. Tel. Co.*, *supra*.)

SULLIVAN, C. J.—This action was brought by the appellants, as plaintiffs, to recover damages in the sum of \$581.17, alleged to have been sustained by reason of an error in the transmission of a telegraphic message delivered by appellants to respondents at the town of Soda Springs, Idaho, on or about March 6, 1907, to be transmitted to parties in Denver, Colo.

The principal issue made by the pleadings was whether the defendant was liable because of a mistake made in the transmission of said telegram. The action was tried by the court and a jury, and at the close of plaintiffs' evidence, counsel for defendant moved for a nonsuit, which motion was granted by the court and judgment of dismissal was entered. The appeal is from said order and the judgment.

The following facts, among others, appear from the record:

The telegraphic message was written upon one of the respondent company's telegraph blanks with all the printed provisions upon said blanks. Said telegraph blank contained

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the following matter, to wit: "Western Union Telegraph Company, Incorporated. . . . Send the following message subject to the terms on back hereof, which are hereby agreed to." The following is the telegram written thereon:

"Soda Springs, Idaho, March 6th, 1907.

"To Colorado Live Stock & Commission Co.,  
Denver Stock Yards, Denver, Colorado.

"Will you honor draft of W. L. White on you in payment of 84 head of steers at three ninety-five per hundred two per cent shrink weighed here.

"**STRONG & STARK.**"

On the face of said telegram the following printed matter occurred: "Read the notice and agreement on the back," and on the back of said telegram blank appears the following: "All Messages Taken By This Company Are Subject to the Following Terms:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premiums thereon, at the following rates, in addition to the

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usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the costs of such delivery.

“The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

“ROBERT C. CLOWRY,  
“President and General Manager.”

Said telegram was introduced in evidence on the trial and one of the plaintiffs testified as follows:

“No, sir, at the time I delivered the telegram to the defendant, I did not ask that it be repeated; I have reference to plaintiffs’ exhibit ‘A’; I did not request that it be telegraphed back for comparison. No, I did not offer the telegraph company any additional compensation for such purpose. . . . We were negotiating the sale with one W. L. White, who was agent for the Colorado Livestock & Commission Company; he was acting as their agent; we agreed to sell the company quite a number of cattle, beef steers. I do not remember the weight of the steers. I have got it down; there were 84 head of steers, they weighed something near 1,000 pounds; we at this time agreed with this agent as to the price per hundred-weight, that is to say, \$3.95 per cwt., this was net with two per cent shrink; I agreed with the agent on the price for the cattle and then went and sent a message to the company to find out whether the agent was responsible or not.”

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In response to said telegram, the following reply was received:

“Denver, Colorado, 8, 6, 1907.

“To Strong & Stark, Soda Springs, Idaho.

“Will honor draft as per telegram if cattle are billed to us.

“COLORADO LIVESTOCK & COMMISSION CO.”

It further appears from the testimony that the telegram when delivered to the commission company read \$3.25 per hundred-weight, making a difference of seventy cents per hundred-weight between the offer and the acceptance, and that was caused by the mistake made by the respondent in transmitting the telegram from Soda Springs to Denver; and that the steers referred to were delivered to the said W. L. White and shipped by him to the Colorado Livestock & Commission Co. at Denver and that said commission company paid for them at the rate of \$3.25 per hundred-weight and refused to pay \$3.95 per hundred, as stated in the telegram as delivered to the telegraph company for transmission.

Upon that state of facts, the question is presented whether the telegraph company is liable for the difference of seventy cents per hundred-weight.

The respondent does not deny that a mistake was made, but contends that it is not liable, for the reason that the telegraph blank contained a certain printed stipulation to the effect that the telegraph company should not be liable for a mistake or delay in transmission or delivery of the message, unless the sender ordered it repeated and paid one-half of the regular charge in addition to the regular charge for sending such message, and it is admitted by the appellants that they did not request the respondent to repeat said message.

There appears to be considerable conflict in the various decisions upon the question of the validity of the printed stipulation upon a telegraph blank limiting the liability of the company for mistakes and delays in transmission of messages. In some of the decisions it is held that such stipulations are valid, and in others, that they are not valid and are contrary to public policy.

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*Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. 663, 44 N. W. 1064, held that such stipulations are invalid under a statute which expressly declares that they shall not be binding. In that case there was a mistake made in transmitting the telegram. "8 o'clock" was written in the telegram delivered for transmission, and when delivered it read "10 o'clock." The court held, under sec. 12 of an act relating to telegraph companies, that said company was "liable for the nondelivery of dispatches intrusted to its care and for all mistakes in transmitting messages made by any person in its employ."

In *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707, the court held under the provisions of said section 12, *supra*, that the plaintiff was entitled to damages for delay in delivering an unrepeatd message. It thus appears that the legislature of the state of Nebraska has considered that such stipulations printed on a telegraph message, relieving the company of liability for mistakes in transmitting or delay in delivering messages, were contrary to public policy and settled the matter by enacting a law to that effect.

In Mississippi, Kentucky and Oklahoma, telegraph companies are by law declared to be common carriers, and the supreme courts of those states held that said stipulation above quoted is invalid and unavailing as a defense under the constitution and statute which declared telegraph companies to be common carriers in their line of business and subject to liability as such. (*Postal Tel. & C. Co. v. Wells*, 82 Miss. 733, 35 So. 190; *W. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. 361, 38 S. W. 1068, 36 L. R. A. 711; *Blackwell M. & E. Co. v. Western Union Co.*, 17 Okl. 376, 89 Pac. 235, 10 Ann. Cas. 855.)

It was held in the Oklahoma case that telegraph companies were liable for the full amount of the loss sustained by reason of their failure properly to deliver messages within a reasonable time, notwithstanding an express stipulation in the contract of carriage that such company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of unrepeatd messages, beyond the amount received

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for sending the same, and that construed in the light of the statutes of Oklahoma, such stipulation is unreasonable and contrary to public policy, and therefore void. In that case the negligence consisted in the unreasonable delay in the delivery of a message.

These decisions proceed upon the theory that telegraph companies are common carriers, made so by the provisions of the constitutions or the statutes in those states.

We have no constitutional or statutory provision in this state that such stipulation is void or that telegraph companies are common carriers. Then the question is presented: What should be the rule in this state as to such rules and regulations in the absence of any constitutional or statutory provisions?

It is contended by counsel for respondent that the great weight of authority upholds the right of the telegraph company to adopt reasonable rules and regulations to govern the sending of messages, and to adopt rules and regulations such as the stipulation under consideration, fixing the liability of the company for delay or mistakes in the transmission or delivery of messages to the sum paid for sending the message; and that said stipulation is a reasonable one. In support of this contention, they cite, with other decisions, *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883. In that opinion the court declares that telegraph companies are not common carriers except in so far as they are obliged to serve all alike, and that they may protect themselves by stipulations similar to those under consideration in this case. The court said:

“By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for nondelivery of a message, whether happening by negligence of its servants or otherwise.”



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That case involved the sending of a message which was in cipher and intelligible only to the sender and his agent to whom it was addressed. The court there holds that telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce and in that they exercise a public employment and are therefore bound to serve all customers alike without discrimination; that they have a duty to the public, but that they are not common carriers, that their duties are different and are performed in different ways, that they are not subject to the same liabilities, and that, like common carriers, they cannot contract with their employers for exemption for liabilities occasioned by their own negligence, but that they may by such contracts or by their rules and regulations, brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent, and whether their rules are reasonable or unreasonable must be determined with reference to public policy precisely as in the case of a carrier; citing *Southern Express Co. v. Caldwell*, 88 U. S. 264 (21 Wall. 264), 22 L. ed. 556.

In the Primrose case, the court referred to the fact that the telegram did not impart to the telegraph company an important business transaction, and did not indicate that if it were not transmitted correctly pecuniary loss might be incurred. In the case at bar, where it appears that the telegram was legibly written and delivered to the operator, it did impart to the telegraph company that it concerned an important business transaction, and imparted notice to the company to the effect that pecuniary loss might result in case a mistake was made in correctly stating the price per hundred-weight of the cattle referred to. It was not like a cipher telegram that was "nonsense" to the operator. In the Primrose case stress is laid upon the fact that the telegram there involved was in cipher and unintelligible. The only mistake made in that telegram was the change of an "a" to a "u," the telegraphic character for an "a" being a dot and a dash, and for "u," two dots and a dash. In the telegram involved in the case at bar, the word "ninety" was changed to "twenty."

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The telegraphic characters for the word "ninety" are as follows: - . . . - . . - . . . and the word for "twenty" as follows: - . - - . - . - . . .

It will be observed from the foregoing that those words when written out in telegraphic characters are very different, and if the figures were used in sending said telegram, the characters for the figure "9" are - . - and for the figure "2" . - . . , and it was carelessness and negligence for an operator to either send or receive the word "twenty" for the word "ninety" in either figures or words.

Counsel also cites *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.), 164, 71 Am. Dec. 461, where it was held that a person desiring to send a message is admonished by the notice printed across said message that to guard against a mistake in transmission it should be repeated. The court said: "He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition."

Counsel also cites *Western Union Tel. Co. v. Carew*, 15 Mich. 525. The court there holds that it would be extremely unjust, considering the small amount of compensation for sending a message, and would effectually put an end to this method of correspondence, to hold them liable for the entire correctness of all messages transmitted or to hold them responsible for all damages which may accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for; or to deny them all power to make rules and regulations to limit their liability even in the case of repeated messages, and the court says it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission. Some of the courts have based their decisions on the rule laid down in those cases.

The last two decisions were rendered, one in 1858 and the other in 1867, when telegraphy was in its infancy and in a very imperfect, uncertain condition, and messages could not be sent or received with the correctness and accuracy with which they are sent in the present day with the improved telegraphic machinery and appliances and greater expertness

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of operators. The court in the latter case refers to the small amount paid for the transmission of a message, and it was evidently in the mind of the court that telegraph companies were poor, struggling corporations; but experience and history now bears out the statement that telegraph companies have become immensely rich on the "small stipend" charged for sending messages, which would indicate that they are charging a great deal more than it actually costs to transmit such messages and to give them a fair return upon the capital invested in the business. The Michigan court, it seems, was mistaken when it suggested that to hold them liable "would effectually put an end to this method of correspondence," as it is shown that a number of the states have held telegraph companies liable and it has not "effectually put an end to this method of correspondence," as it is used a great deal more at the present time than it ever was before, regardless of the courts holding it liable for damages arising because of its negligence. Telegraphy has been so perfected with its improved machinery, instruments, equipment and appliances that with competent and careful operators telegrams may be sent with accuracy. That being true, telegraph companies should be held to a higher degree of care, fidelity and diligence than could reasonably have been required of them at the dates when the last above cited opinions were rendered, and they should be held to a higher degree of care in sending and delivering telegrams that involve the property rights of either the sender or receiver than perhaps they would be in social telegrams, or telegrams that do not involve property rights and others of particular interest to the sender or receiver. While, under the decision of the United States supreme court above cited, a telegraph company is held not to be a common carrier, it is, however, a corporation doing business for the public, and must be held liable for damages arising from its own carelessness and negligence or the carelessness and negligence of its agents. While it may make rules and regulations in regard to the conduct of its business, the reasonableness or unreasonableness of such rules must be determined with reference to public policy, precisely as in the

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case of common carriers. Public policy is that principle of law under which freedom of contract or private dealing is restricted by law for the good of the community—the public good. (32 Cyc. 1251.) A stipulation in a contract which exempts the corporation from damages for its own negligence is void when applied to a telegraph company as well as when applied to a common carrier.

In *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. 361, 38 S. W. 1068, 36 L. R. A. 711, the supreme court of that state has clearly distinguished, if not reversed, the doctrine laid down in *Camp v. Western Union Tel. Co.* (Ky.), 1 Met. 164, 71 Am. Dec. 461, and there holds that a stipulation such as the one under consideration in this case, providing that unless the message is repeated the company is not liable, is invalid, and says:

“It is true that in *Camp v.* this appellant (*Western Union Tel. Co.*), the same or a similar stipulation as the one in question as to the repetition of messages was held to be valid, but that case was decided in 1858, and before the adoption of the present constitution.”

In the *Eubanks* case the decision of the supreme court in *Primrose v. Western Union*, *supra*, is referred to in the following manner by the court:

“It is true that that decision upheld the stipulation in question as well as the stipulation in regard to cipher messages and obscure messages, but it is also true that Chief Justice Fuller and Mr. Justice Harlan dissented and Mr. Justice White took no part in the decision. It will also be seen from the opinion that many courts of last resort had decided otherwise as to such stipulations,” and then cites many other authorities holding that such stipulations are invalid.

In *Smith v. Western Union Tel. Co.*, 83 Ky. 112, 4 Am. St. 126, the court, in discussing the obligation of telegraph companies, said:

“It is, however, a public agent; it exercises a *quasi*-public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by contract with the in-

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dividual. He is but one of millions; his business will perhaps not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect. Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are, therefore, conferred upon it; it has the power of eminent domain; if it did not serve the public, it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business so wonderful in its growth, so necessary to the life of commerce and useful beyond estimate; and if it relies upon a notice or contract to restrict its liability, it must be one not in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinary powers given it and the virtual monopoly it almost necessarily enjoys, the court should compel it *nolens volens* to perform the corresponding duties of diligence and good faith to the public thereby created. Any other rule would defeat the very purposes for which these companies are chartered, to wit: the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability, yet they cannot do so as against their own negligence. They undertake to exercise a public employment which in many respects is analogous to that of a common carrier, and they must therefore bring to it that degree of skill and care which a prudent man would under the circumstances exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty or to restrict their liability for its nonuse is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power and leave the public comparatively remediless."

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As holding or tending to hold that a telegraph company is liable for misconduct or negligence, regardless of said stipulation, see *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. 148, 7 So. 419; *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Eubank v. Western Union Tel. Co.*, 100 Ky. 591, 66 Am. St. 361, 38 S. W. 1068, 36 L. R. A. 711; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. 353, 10 Atl. 495; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, 89 Am. St. 666, 31 So. 222, 56 L. R. A. 486; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. 609, 37 S. W. 904, 34 L. R. A. 492; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. 363, 44 N. W. 1064; *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Postal Tel. Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876; *Brown v. Postal Tel. Co.*, 111 N. C. 187, 32 Am. St. 793, 16 S. E. 179, 17 L. R. A. 648; *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Aiken v. Western Union Tel. Co.*, 5 S. C. 358, 1 Am. Elec. Cas. 121; *Kirby v. Western Union Tel. Co.*, 7 S. D. 623, 65 N. W. 37, 30 L. R. A. 612; *Western Union Tel. Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443; *Wertz v. Western Union Tel. Co.*, 8 Utah, 499, 33 Pac. 136; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. 917, 17 Atl. 736, 4 L. R. A. 611; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; *Western Union Tel. Co. v. Cook*, 61 Fed. 624, 9 C. C. A. 680; *Gt. Northwestern Tel. Co. v. Lawrence*, 1 Rapports Judic. de Quebec, 1; also, Joyce on Electric Law, 2d ed., secs. 681, 683, 684, 685, 689, 692, 701, 702, 707, 712.

In summarizing the diversity of decisions as to such stipulations by telegraph companies that text-writer (Joyce) in sec. 716, says:

“It is evident from the preceding decisions that it is impossible to formulate any other than what might well be called a composite rule and inasmuch as the state courts are showing a more decided inclination to adhere to their own precedents, it is doubtful whether as against such precedents a court would follow decisions of other state courts even though they might be deemed to constitute what has been called the weight of authority.”

Owing to the fact that many of the decisions which hold that the stipulation under consideration is valid and binding are based upon the decisions of *Camp v. Western Union Tel. Co.*, *supra*, decided in 1858, and *Western Union Tel. Co. v. Carew*, *supra*, which was decided in 1867, and long before telegraphy had reached its present state of efficiency and accuracy, this court is not inclined to follow that line of decisions. Since telegraph companies are public agents, exercising a *quasi*-public employment, carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should be released by its own rules or regulations from damages occasioned by its carelessness and negligence. It is chartered for public purposes; it has the power of eminent domain; the public are compelled to rely absolutely on the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and if it fails to do so, it is liable in damages for such failure, and cannot restrict its liability by rule or regulation which attempts to excuse it for its own negligence. It is a public servant, and must serve the people impartially, carefully and in good faith. We do not hold that the company is an insurer against mistakes or delays arising from causes beyond its own control, but it is liable for damages arising from the use of defective instruments or want of skill or care on the part of operators. A stipulation exempting it from liability for its own negligence would be contrary to public policy.

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Some of the authorities hold that a telegraph company may adopt rules and regulations which legally exempt it from "ordinary negligence," but that they cannot make such rules or regulations that will shield or protect them from damages arising from "gross negligence." They draw a distinction between "ordinary negligence" and "gross negligence." Bouvier, in his Law Dictionary, defines negligence to be "The omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do." Mr. English, in his Law Dictionary, defines negligence to be "The omission to exercise proper care and caution; failure to perform a duty or doing it improperly, and the facts in such cases must decide the degree of negligence." Thompson on Electricity, sec. 186, referring to the different degrees of negligence, says: "Modern judicial opinion is drifting toward the view that a division of care and correlatively of negligence into degrees is a matter too subtle and refined for the ordinary purpose of justice, and it has been well said that a gross negligence is nothing more than negligence with an epithet."

The term "gross negligence" undoubtedly describes colloquially a greater degree of carelessness than the term "ordinary negligence," but the legal significance of the term is difficult to ascertain. In one view, "gross negligence" is deemed equivalent in law to fraud or to intentional wrong; in another, it is deemed exactly synonymous with ordinary negligence; while in a third it is deemed to be applicable to those degrees of carelessness, whatever they may be, existent between ordinary negligence and wilful negligence or fraud. (Sec. 37, Gray on Communication by Telegraph.) And in sec. 38, the author says: "The doctrine that in a legal contemplation there is no distinction between gross negligence and ordinary negligence has certainly not been adopted uniformly by the courts which have considered negligence on the part of the telegraph company."

In certain cases "gross negligence" is evidently deemed the equivalent in legal contemplation of "ordinary negli-



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gence." In many cases, however, "gross negligence" is used to denote a degree of carelessness greater than the degree implied by "ordinary negligence," and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses occurring through their ordinary negligence, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence. Unfortunately, in only one of these cases is an attempt made to define gross negligence or a test offered to distinguish it from either ordinary negligence or fraud. In the rest of these cases, therefore, it is impossible to determine whether gross negligence is deemed to be synonymous with wilful negligence or fraud, or to be applicable only to those degrees of carelessness, whatever they may be, existent between wilful and ordinary negligence.

In the 4th volume of "Words and Phrases," we find the following definitions of "gross negligence" supported by the many authorities cited there: "Gross negligence is the want of even a slight care and diligence." And again "Gross negligence is the want of that diligence that even careless men are accustomed to exercise." And, "Gross negligence is the want of that care which every man of common sense, however inattentive he may be, takes of his own property, and is nothing more than negligence with the addition of a vituperative epithet."

We shall not undertake to add anything to the numerous definitions cited of "negligence" and "gross negligence," but do hold that if damages occur by reason of mistakes made because of defective instruments or incompetent operators, or through carelessness or negligence that with ordinary care might have been avoided, the company is liable. And where it appears that the word "ninety" was erroneously transmitted "twenty," the company is liable unless it can show that the mistake was made under circumstances and conditions over which it had no control. Telegraph companies must therefore be held to a greater degree of care than is included in "wilful negligence" or "fraud."

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It is contended by counsel for respondent that the complaint does not allege negligence on the part of the company in making the mistake in sending said telegram, and for that reason does not state a cause of action. The sufficiency of the complaint, however, was not challenged by demurrer or upon the admissibility of evidence and was only raised upon the motion for a nonsuit. This, however, is not a ground for a nonsuit. Sec. 4354, Rev. Codes, provides that an action may be dismissed or a judgment of nonsuit entered on five separate grounds. None of the first four mentioned applies to the case at bar, but the fifth is applicable and provides that the court upon motion may grant a nonsuit if plaintiff fails to prove a sufficient case for the jury. It was evidently on that ground that the court sustained the motion for a nonsuit and entered a judgment of dismissal, as it is virtually conceded the court held that said stipulation was valid. This court holds that the evidence introduced on the trial was sufficient to show negligence; in other words, to make a *prima facie* case, and as the judgment must be reversed and the cause remanded, the plaintiffs should be permitted to amend their complaint, if they desire to do so. If application had been made at the close of the trial to amend the complaint to conform to the proof, the court no doubt would have granted the application, as under the views expressed in this opinion, the plaintiffs made a *prima facie* case by the evidence introduced. Where a telegraph company fails to transmit a message correctly, the proof of that fact is *prima facie* evidence of the company's negligence; so proof by the plaintiff of the contract, which may be implied by the delivery of the message to be transmitted and its acceptance by the defendant's agent, and of the breach, makes out a *prima facie* case, and the plaintiff need not go further and show any further negligence or omission of the defendant. (Jones on Telegraph and Telephone Companies, sec. 36.) If the failure was not the result of negligence, the means of showing that fact is almost invariably within the exclusive possession of the company, and for the courts to require the sender to prove the negligence, after showing the mistake, would be in many

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cases to require an impossibility, not infrequently resulting in enabling the company to evade a just liability. (Sec. 36, *supra*, and authorities there cited.)

We conclude that when the sender delivers a message to the agent of a telegraph company for transmission and it is received by him for transmission, it is clearly implied and understood that the message must be correctly sent, and upon proof that it was not correctly sent, a *prima facie* case is made. Then if the mistake was not occasioned by incompetent operators or defective instruments, and was occasioned by the elements or some matter or thing over which the company had no control, it devolves upon the company to prove that as a matter of defense. Therefore, when the plaintiff proved that said message was delivered to the agents of the company for transmission and that they accepted it and made a mistake in its transmission, the plaintiff had made a *prima facie* case and the court erred in granting a nonsuit and entering a judgment of dismissal.

It is also contended by counsel for respondent that the agreement for the sale of the cattle was made with the agent of the Colorado Livestock & Commission Co., and that by reason of that contract the steers were shipped to said commission company, and that fact would render said company liable for the balance due on said steers at the rate of \$3.95 per hundred-weight. There is nothing in that contention, for the reason that the appellants did not close the contract for the sale with White, but closed it with the commission company. The negotiation for the sale of the steers was begun with White, but appellants would not sell them until they communicated with the company by telegraph. In the reply telegram, the company stated that they would honor the draft if the cattle were billed to them. The contract was made directly with the commission company and not with White, and on that state of facts the commission company could not be compelled to pay a greater price than it had agreed to pay as per its reply telegram.

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**Points Decided.**

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The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Costs of appeal are awarded to appellant.

Stewart and Ailshie, JJ., concur.

(June 28, 1910.)

ON REHEARING.

[109 Pac. 917.]

**TELEGRAPH COMPANY NOT AGENT OF SENDER—TELEGRAPH COMPANY.  
INDEPENDENT PRINCIPAL—NEGLIGENT ERROR IN TRANSMISSION OF  
MESSAGE—MEASURE OF DAMAGE.**

(Syllabus by the court on rehearing.)

1. A sender of a telegraphic message does not constitute the telegraph company his agent and is not bound to the receiver of the message by the terms of the message as negligently changed or altered by the company.

2. A telegraph company is a public service corporation engaged in a public utility, and in receiving, transmitting, and delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort the same as other principals.

3. Where S. & S. sent a telegram to C. L. S. & C. Co., inquiring if the company would honor draft in payment for 84 head of steers at \$3.95 per hundred, and the telegraph company negligently changed or altered the message so that when received at its destination and delivered to the sendee it read \$3.25 instead of \$3.95, and the stock was shipped and C. L. S. & C. Co. paid therefor at the rate of \$3.25, if S. & S. acted prudently and with due diligence after discovering the mistake, so as to minimize the damage and loss, the measure of damage which they will be entitled to recover from the telegraph company for its tort will be the difference between the market value of the stock the day the message was sent and the price actually paid by C. L. S. & C. Co.

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Argument for Respondent.

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Thomas L. Glenn, for Appellants.

The court correctly ruled in its former opinion that the contract was made between the appellants and the livestock and commission company, by means of the telegrams, and not with White or through White as the agent of the livestock company, for the reason that the weight of authority favors the proposition that the telegraph company was the agent of the appellants in the delivery of the message to the livestock company; that the livestock company completed the contract so far as it was concerned by delivering to the respondent a message accepting the offer of appellants, the appellants thereupon complying with the terms of the message of acceptance; the idea of agency of White does not appear in any manner in either of the telegrams; the only evidence, if evidence at all, of such agency is the statement of witness Stark wherein he stated that White represented himself to be the agent of said company, and, if he was agent, he was certainly repudiated by both parties in their telegraphic correspondence. (*Pepper v. W. U. Tel. Co.*, 87 Tenn. 554, 10 Am. St. 699, 11 S. W. 783, 4 L. R. A. 660, and cases cited; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 580, 3 Ann. Cas. 566; Thompson on Law of Electricity, sec. 496; Joyce on Electric Law, 2d ed., sec. 905; 10 Current Law, 1844.)

Clark & Budge, for Respondent.

The parties were never of the same mind concerning a material element of the contract, to wit, the price, and therefore there was no meeting of minds; therefore there was no contract as a result of the telegrams. Appellants were not bound to deliver the cattle at the price quoted in the telegram as delivered to the commission company, because they never agreed to sell at such a figure. They might have otherwise disposed of the cattle and obtained the highest possible price for them without regard to the telegrams, for the telegrams did not create or give rise to any obligation on the part of the appellants to sell to the commission company at any particular figure. (*Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10

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Am. St. 699, 4 L. R. A. 660, 11 S. W. 783; *Postal Telegraph Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Shingleur v. Telegraph Co.*, 72 Miss. 1030, 48 Am. St. 604, 18 So. 425, 30 L. R. A. 444.)

The cases above cited, and also the case of *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. 109, 21 N. E. 4, hold that the sender has an action based upon his contract with the telegraph company for the correct transmission of the message, or an action in tort when he has suffered because of an error, and they also hold that the sendee may sue in tort; but we cannot understand upon what theory appellants can hold the respondent liable for an error when they suffered no damage because of the error. In other words, the error did not affect the binding contract entered into between the appellants and the commission company through the agency of White.

AILSHIE, J.—A rehearing was granted in this case on that particular portion of the original opinion of the court which holds that “the contract was made directly with the commission company and not with White, and on that state of facts the commission company could not be compelled to pay a greater price than it had agreed to pay as per its reply telegram.”

On the reargument of this case on the point submitted, the controversy has revolved about the legal proposition as to whether or not a telegraph company in receiving and sending a message acts as the agent of the sender. A determination of this question is necessary to a correct and proper understanding of the principle of law applicable in the determination of the case. We have made a very careful and somewhat extended examination both of the text-writers and the court decisions on this question, and emerge from the investigation fully convinced that the authorities are irreconcilable on the question. This confusion, it seems to us, has arisen out of the endeavor on the part of the courts to determine just what particular settled and established rule of law is applicable and should be invoked in dealing with an entirely

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new agency as applied in business and commerce. This is a difficulty which constantly confronts the courts. New inventions are constantly coming into use; new uses, both public and private, are coming into being; new methods and means of transacting and carrying on business are applied; and it is a problem fraught with many difficulties and embarrassments, as the books will readily disclose, for the courts to apply, in every instance, the correct principle of law so as to accomplish substantial justice to all concerned and at the same time promote the public interests involved.

In the early days of communication by telegraph when cases began to find their way into the English and Scotch courts, it was held by those courts that the law of agency did not apply, and that the company should not be treated as an agent of the sender of a message, but rather as an agency of the government. (*Henkel v. Pape*, 40 L. J. Exch. 15, L. R. 6 Exch. 7, 23 L. T. 419, 19 W. R. 106; *Allen's Tel. Cases*, 456; *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3 Series) 35 (Scot. 1871); *Allen's Tel. Cases*, 697. To the same effect, see *Playford v. Tel. Co.*, L. R. 4 Q. B. 706; S. C., *Allen's Tel. Cas.* 437; *Dickson v. Tel. Co.*, 2 C. P. Div. 62; S. C., 3 C. P. Div. 1.) There the telegraph is under the control of the government and is operated in connection with the postoffice department (32 & 33 Vict., c. 73), and the cases were apparently decided on the theory that the government is not responsible for the negligence, errors or mistakes of its clerks and servants. In this country there seems to have been more or less diversity of opinion, some of the cases, and especially the early cases, proceeding upon the implied, if not express, theory that the company is the agent of the sender and that the law of agency is the rule of law to be applied in such cases.

Mr. Gray, in his work on *Communication by Telegraph*, written twenty-five years ago, at sec. 104 says: "While the employer of a telegraph company is responsible upon the words of a message as delivered, where they are the ones that he authorized, is he responsible upon them where, owing to the negligence of the company, they differ materially from the ones that he authorized? This question is answered in the

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negative in England and in Scotland. In this country, on the other hand, it is answered, as a general rule, in the affirmative.

"Courts have rarely considered at length the relationship between a telegraph company and its employer. The view that the employer of a telegraph company is responsible upon a negligently altered message has been rested, it seems, upon two different grounds: (1) A telegraph company is the agent of its employer; consequently, it renders the employer responsible upon any message which it delivers. (2) One who employs a telegraph company employs it to do a certain act,—to communicate a certain message; consequently, he is responsible for the torts of the company committed in the performance of that act. These grounds will now be considered separately and in order."

In a note to this section the author cites *Durkee v. Vermont C. Rd. Co.*, 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; *Wilson v. M. & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291, with the following comment on those cases: "These cases overlook, it seems, the fact that a telegraph company, in delivering an altered message, does an act beyond the scope both of the authority which the employer actually delegates to it, and of the authority that he holds it out as possessing."

Subsequent to the issuance of Gray's work and in 1891, Judge Seymour D. Thompson issued his work on the Law of Electricity, and in sec. 480 says: "In England and Scotland, the idea that the telegraph company is the agent of the sender to transmit his communication to the addressee, is repudiated." In sec. 481 he discusses and reviews the decision of the supreme court of Tennessee in *Pepper v. Western Union T. Co.*, 87 Tenn. 554, 10 Am. St. 699, 11 S. W. 783, 4 L. R. A. 660, 25 Am. & Eng. Corp. Cas. 542, 2 Am. Elec. Cas. 756, and disapproves the holding which he calls "dictum" in that opinion, and in sec. 482 the author says: "It is obvious, however, that the foregoing principle cannot be of universal application. Many cases will arise where the material fact will be, not what was the message which was delivered, but what was the message which was received. The party who originally sends an order by telegraph makes the telegraph com-



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pany his *agent* for its transmission and delivery, and, as between himself and the person to whom it is addressed, he is bound by the message *as delivered*. It follows that where the legal rights of the receiver of the message, founded upon an order transmitted therein, are in question, he is entitled to put in evidence the message *actually received* as the original."

Some seventeen years later, and in 1907, Joyce & Joyce issued the second edition of their work on Electric Law, and in sec. 905 review the conclusion reached by the different text-writers as follows: "Mr. Gray (Gray on Teleg., sec. 104, note 3) states the rule as holding nonagency of the telegraph company in England, and says that the rule here is contra, although he inclines to the English rule (see, also, Scott & Jarnigan on Teleg., secs. 340, 341). Judge Thompson (Thompson on Electricity, ed. 1891, secs. 483-487) holds to the rule which makes the sender who telegraphs a proposal bound by the terms of the message as delivered, on the ground of agency of the telegraph company. In other words, the sender must stand by the proposition embodied in the message as delivered by his agent, and sue the company for the damages he has sustained by its misfeasance, but he qualifies this by the rule that the party who first invites the use of the telegraphic agency impliedly undertakes to assume the risk of the telegraph company's mistakes. (This author relies upon *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. 353, 10 Atl. 495, *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, *Dunning v. Roberts*, 35 Barb. (N. Y.) 463, and *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127, 140.) Mr. Crosswell (Crosswell on Electricity, ed. 1895, secs. 684-687) notes substantially the English rule, and briefly considers the Georgia and Maine cases, and states no rule so far as we can discover."

Joyce & Joyce state their conclusion in sec. 907 as follows: "We must confess that we believe there can be no logical deduction from the various principles involved, as to what should be the rule. The determination must contain some element of what is called a 'moral' ground, or must be an arbitrary, absolute one. We favor, however, the rulings in

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the Tennessee, and Mississippi cases, but admit there is much force in Judge Thompson's conclusion, although that conclusion might have been in accord with the Tennessee and Mississippi cases if he had had these cases before him."

The American courts are by no means in harmony over this subject. *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, decided in 1884, held unqualifiedly that the telegraph company is the agent of the sender of a message, and that if the message as actually delivered offers merchandise at a less price than the message as written by the sender offered, and the proposition is accepted, the sender is bound by the contract. This rule seems to have been uniformly adhered to by the Georgia courts. (See *Brooke v. Western Union Tel. Co.*, 119 Ga. 695, 46 S. E. 826; *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 88 Am. St. 36, 40 S. E. 815; *Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517.) The Shotter case has been frequently cited and commented on by the courts and text-writers,—sometimes with approval, sometimes with doubts or express disapproval.

The greater number of cases that have had occasion to consider the question of agency have arisen out of the introduction of evidence, or have in some way involved the question of either what constituted the original message or what was the best evidence. Cases dealing with the admission of evidence or what constituted the best evidence of the original message are *Saveland v. Green*, 40 Wis. 431; *Durkee v. Vermont C. Rd. Co.*, 29 Vt. 127; *Howley v. Whipple*, 48 N. H. 487; *Morgan v. People*, 59 Ill. 58; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Barons v. Brown*, 25 Kan. 410; *Matteson v. Noyes*, 25 Ill. 591; *Cairo & St. Louis R. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *State v. Hopkins*, 50 Vt. 316; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566.

*Pepper v. Western Union Tel. Co.*, *supra*, decided by the supreme court of Tennessee in 1889, is perhaps the most widely cited, exhaustive and well-considered American case to repudiate the doctrine that the company is the agent of the sender of the message. This case states the English rule and

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reviews the American authorities, and indulges in some independent reasoning and consideration for the rule, and concludes that what is known as the American rule, that the company is the agent of the sender of a message, really rests on the single case of *W. U. Tel. Co. v. Shotter*, *supra*. The court concludes by repudiating the agency rule and holds the company as an independent principal.

In 1895 the supreme court of Mississippi was confronted with the same question, and in *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 48 Am. St. 604, 30 L. R. A. 444, 18 So. 425, cited, approved and followed the Pepper case, and held that a telegraph company is liable either to the sender or sendee of the message by reason of the delivery of an altered message,—to the sender in contract or tort and to the sendee in tort. This case holds that the liability of a telegraph company for incorrectly transmitting a message and thus delivering an incorrect copy of the original, is that of an “independent principal” to either the sender or sendee, whichever may be injured thereby. The Mississippi court calls attention to the Shotter case and declines to follow it. To same effect see the later Tennessee case of *W. U. Tel. Co. v. Potts*, 120 Tenn. 37, 127 Am. St. 991, 113 S. W. 789, 19 L. R. A., N. S., 479.

In 1901 the Kentucky court of appeals in *Postal Tel. & Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, had under consideration the liability of the sender of a message to comply with the contract proposed by his message where the message had been changed or altered in the transmission and delivered to the sendee in the changed form. The court reviews the authorities at some length and then says: “This exact question was fully considered in the case of *Pepper v. Telegraph Co.*, decided by the supreme court of Tennessee, and reported in 87 Tenn. 554, 10 Am. St. 699, 11 S. W. 783, 4 L. R. A. 661. In that case the court said, viz.: ‘The minds of the party who sends a message in certain words, and the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound the one to

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the other.' ” To the same effect see *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 Am. St. 557, 6 S. E. 770.

The case of *German Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575, is relied upon by respondent as authority for the contention that Strong & Stark could recover the full market value of this property from the commission company notwithstanding the mistake in the telegram, and that there was no meeting of the minds of the parties. In that case the plaintiff received a telegram from Cornforth & Co. of Denver, Colo., asking for prices on oranges. The plaintiff thereupon sent the following message: “Offer Los Angeles, San Gabriel, Santa Ana oranges one fifty, Riverside two sixty.” As received, the message read: “Offer Los Angeles, San Gabriel, Santa Ana oranges one fifty, Riverside One sixty.” Cornforth & Co. immediately wired for two carloads of Riverside oranges, which were immediately shipped. After receiving the oranges they paid the fruit company \$1.60 per box and refused to pay any more. The fruit company thereupon sued the telegraph company for the difference between the price quoted and that received under the altered message. The court cites no authorities and does not consider the question of agency or whether there was a meeting of the minds of the contracting parties. That case turns wholly upon the finding of the trial court that *Cornforth & Co. knew that there was a mistake in the telegram*, and that Riverside oranges were at that time current on the market at \$2.60 per box. The court held that Cornforth & Co. were liable to the fruit company for the reasonable and market value of the fruit which was \$2.60, *and that knowing that there was a mistake in the telegram they were committing a fraud on the fruit company*, and that the fruit company could have and should have recovered the full market price from Cornforth & Co. The case also inferentially holds that the fruit company could not waive its right to proceed against Cornforth & Co. to collect the market value of the property and thereby minimize the loss to all parties, and instead thereof sue the telegraph company for the differ-

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ence and allow the purchaser of the fruit "to get away with a fraudulently acquired advantage" in such a manner. That case turned upon the peculiar facts there involved, and contains no holding contrary to the general principle of law running through the cases heretofore considered. A consideration of this question of agency has been required, and its determination has been necessary in order to ascertain whether the sender of a proposition to buy or sell is bound to the sendee if his proposition is incorrectly delivered. If the company is his agent, then of course he is bound by the contract whether the proposition be delivered as given or not, and in such case the sendee would have to look to the sender for any damages he might sustain, while if no agency exists, there would be no meeting of minds and no contract in a case where the company changed or altered the message making the proposition, and the sendee, if damaged by reason of the delivery of the changed or false message, would be relegated to his action in tort against the company for the wrong committed. If it should be conceded that the company is the agent of the sender of the message, that agency can in no sense extend to the *change* or *alteration* of the message. The agency would be *special and limited* to the identical message authorized by the sender, and the sendee and everyone else has notice that the company has no authority from the sender to deliver to him or to anyone else an *altered or changed message*, or one in any manner different from the one filed in the transmitting office. (See foregoing quotation from Gray's note to text; *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 Am. St. 557, 6 S. E. 770.)

Our consideration of the authorities and of the nature and character of the service rendered by a telegraph company, the public utility it serves and the public character of its existence and the franchise it enjoys, all constrain us to hold that the law of agency is not applicable and that the company cannot be properly held to be the agent of the sender of the message. A telegraph company should rather be treated as an independent principal or contracting party and liable as other principals. These companies are in fact very similar

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to common carriers, and ought to be treated by the law as it deals with the common carrier. It is true, as said by many of the authorities, that the company is not expected to take the written message as delivered to it and transport it on the same sheet of paper to the sendee, but that is not the test and is an evasion of the real question. What the sender of a telegraphic message wants and expects is that the *words, figures or characters* of his message,—not the paper containing them,—shall be delivered to the sendee exactly as expressed by him without change or alteration. He asks the company to become the transmitter or carrier of the *inquiry, proposition, news or intelligence* contained in his message, and for this purpose makes the contract and pays the toll or rate established. This is the service of a common carrier. The only difference of any consequence which we can discover is that the telegraph company is not an absolute insurer of the literal accuracy of delivery of every message under all circumstances, yet in this the difference is not so great as was supposed twenty-five years ago. Indeed, the books disclose that telegraph companies were not held to anything like the degree of accuracy a few years ago as is now required of them, and this is at once apparent. Telegraphy had not been developed and perfected then to anything like the exactness, either mechanically or scientifically, that it is now.

Having determined that the telegraph company was not the agent of Strong & Stark, it follows that there was no meeting of the minds of the contracting parties as to the price for which the cattle were to be sold, and that Strong & Stark had a right to reclaim the same upon learning of the mistake made in the delivery of their proposition. They received a draft from White, the agent of the commission company, and shipped the cattle, and did not learn that any error had been made in the transmission and delivery of their message until after the draft had been presented and the commission company had refused to pay any greater rate than \$3.25 per hundred. While there is no evidence in the record which shows just where the cattle were or what had become of them at the time Strong & Stark received the information of this mistake

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and the refusal of the commission company to pay \$3.95 per hundred, still it is apparent that they had already been shipped and that they had very likely been received at the stock-yards and perhaps sold and possibly butchered. This, of course, is somewhat conjectural from the present record. It is clear, however, that the freight rates and expense of shipping had already been incurred, and that if the shippers should have reclaimed their property they had still incurred a large expense which they must necessarily take into consideration as prudent and reasonable men if they should have refused to allow the commission company to retain the stock at \$3.25 per hundred which the latter had promised and agreed to pay. Whatever damage and loss may have been sustained by the sellers of this property on account of the transaction is directly traceable to the tort committed by the telegraph company in delivering to the commission company an altered and false message. As said by the court in *Pepper v. Western Union Tel. Co.*, *supra*, "they [Strong & Stark] were bound to have taken just such steps as a reasonable prudent man would take to save himself had the mistake or error been his own. A man, under such circumstances, is not to be held to have done the wisest and best thing but to the exercise of reasonable skill and diligence. Whether he so acted or not is a question of fact to be left to the jury under proper instructions by the court." The question would necessarily present itself to the sellers of the property the minute they learned of this mistake and of the condition under which the purchasers had accepted the proposition as to what was the best thing to do in order to minimize the loss and damage,—whether it was better to let the purchasers take the property at the price they had proposed to pay and then look to the tort-feasor (the telegraph company) for their damages, or to reclaim the property and seek another purchaser. It may have been impossible to reclaim the property, as it may have been used or consumed or so dissipated that it could not have been found or identified; or the expense of reclaiming it and securing another purchaser might have exceeded by far the difference between the price as named in the proposition and

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that named in the message as delivered by the telegraph company to the purchaser.

These questions are all proper matters to be submitted to the jury in ascertaining the damage to be awarded. These phases of the question are very clearly and learnedly discussed and considered in the closing portion of the Pepper case. (See *Hocutt v. Western Union Tel. Co.*, 147 N. C. 186, 60 S. E. 980, and cases there cited.) Since this case must go back for a new trial, it is proper to say here that the measure of damages is not the difference between the price proposed in the telegram delivered by Strong & Stark to the respondent and that given in the message as delivered to the livestock company. On the contrary, the measure of damages in this case would be the difference between the market value of the property on the day of sending the telegram and the price paid by the livestock company in accordance with the telegram as delivered to them. The price of \$3.95 as fixed in the telegram filed at Soda Springs may have indicated the correct market price on that day, but since there was no contract made and no meeting of the minds as to the price, it could not be said as a fact in the absence of proof that Strong & Stark could have procured this price for their property, nor can they say with any degree of certainty that the livestock company would have accepted the proposition had the message been delivered quoting that price. It is true, as said in the Pepper case, that this telegram might be taken as *prima facie* evidence that such was the market price on that day. (*Western Union Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 112; *Bowie v. Western Union Tel. Co.*, 78 S. C. 424, 59 S. E. 66; *Barker v. Western Union Tel. Co.*, 134 Wis. 147, 126 Am. St. 1017, 114 N. W. 440, 14 L. R. A., N. S., 533.)

This brings us to the concluding and ultimate proposition for which the respondent contends in this case, and that is that a contract was in fact made between Strong & Stark and the livestock company independently of the communication by telegraph. White was apparently a purchasing agent for the commission company and was at Soda Springs on the date this telegram was sent. He had been negotiating with the



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appellants concerning the purchase of this stock, and the state of the negotiations is given by Stark in his testimony as follows: "On or about the 6th day of March, 1907, we sold to the Colorado Livestock & Commission Company a lot of cattle. We were negotiating the sale with W. L. White who was agent for the Colorado Livestock & Commission Company; he was acting as their agent; we agreed to sell the company quite a number of cattle, beef steers. I do not remember the weight of the steers; they weighed something near 1,000 pounds; we at this time agreed with this agent as to the price per hundred-weight, that is to say, \$3.95 per hundred-weight; this was net with two per cent shrinkage; I agreed with the agent on the price for the cattle, and then went and sent a message to the company to find out whether the agent was responsible or not." It will be seen that the respondents up to the time of sending the telegram had been negotiating with the commission company through the medium of their purchasing agent, White. They had apparently reached an agreement as to the terms and conditions of the sale, but the vendors of the stock evidently had some question as to the authority of the agent in some or all respects, and so they sent the telegram set forth in the original opinion in this case. The commission company, on the other hand, instead of advising vendors that they would abide by any agreement made by White, wired the vendors, "Will honor draft as per telegram if cattle are billed to us." The "telegram" referred to in this reply as it had been delivered to the commission company quoted the cattle at \$3.25 instead of \$3.95 as had been agreed upon by the vendors and White. This communication by wire taking place between Strong & Stark, the vendors of the property, and the commission company, the purchasers, was an attempt at abrogation or modification *by the principals themselves* of the contract which had been entered into by the *principal* on the one hand and the agent of the company on the other. It relegated the parties to the terms of the new or modified contract. It would be quite a different proposition had White been negotiating and contracting with the vendors of this property as a principal himself; in that

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case a contract would have been closed and consummated, but since he was dealing as an agent for a principal, and the party with whom he was dealing and his principal subsequently took up the negotiations themselves, they might cancel, affirm or modify the contract as they saw fit, and the subsequent affirmation, modification or cancellation of the contract would be binding on both the principals. The principal could take the matter out of the hands of his agent either in whole or part, and if concurred in by the other contracting party would leave the two contracting parties to the new status to be fixed by them.

We conclude, therefore, that in this case the contract made between Strong & Stark on the one hand as principals and White on the other hand as agent for the commission company was subsequently abrogated by the principals themselves, and that by reason of the tort committed by the telegraph company in altering the communication there was finally no meeting of the minds of the contracting parties.

For the foregoing reasons, the original opinion in this case must stand as the opinion and judgment of the court. The judgment of the trial court must be reversed and the cause remanded with direction to grant a new trial. Costs awarded to appellant.

Sullivan, C. J., concurs.

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Argument for Appellant.

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(July 22, 1910.)

STATE, Respondent, v. MARSHALL HAMMOCK, Appellant.

[110 Pac. 169.]

RAPE—UNCHASTITY—OTHER OFFENSES—CONSPIRACY TO COMMIT RAPE—  
EVIDENCE OF CO-CONSPIRATOR.

(Syllabus by the court.)

1. On a trial for rape, where the female was under the age of consent at the time of the commission of the offense, evidence as to the chastity of the prosecutrix, or that she had previously had sexual intercourse with other men, is not admissible.

2. Where a conspiracy existed between defendant and his wife for the purpose generally of procuring girls to have sexual intercourse with defendant, a statement or declaration made by the wife subsequent to the commission of a specific act, and during the existence of the common design, is admissible against the defendant as a declaration from a co-conspirator.

3. Evidence of the common purpose to commit like crimes on other girls and the commission of such offenses by the defendant held admissible under the circumstances of this case, as incidents in the commission of the common criminal design included in the conspiracy.

4. Alleged errors in the admission and rejection of evidence examined, and held, that no substantial right of defendant has been prejudiced by the rulings of the court.

APPEAL from the judgment of the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Prosecution for rape on a female under the age of consent. From a judgment of conviction defendant appealed. *Affirmed.*

Frank Harris, for Appellant.

“The declaration, to be admissible, must not only be made during the pendency of the criminal enterprise, but also in furtherance of its objects. A narrative to a stranger, related during the pendency of the criminal enterprise, but of a past event or occurrence, is just as objectionable as if related after

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Argument for Respondent.

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the criminal enterprise is terminated." (*Samples v. People*, 121 Ill. 547, 13 N. E. 536; *Brown v. United States*, 150 U. S. 93, 14 Sup. Ct. 37, 37 L. ed. 1010; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Opie*, 123 Cal. 294, 55 Pac. 989; *People v. Aleck*, 61 Cal. 137; *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487.)

"If there has been complicity between all of the defendants in the commission of the offense, the declarations by either after the commission of the offense could not be used as evidence against the other defendants." (*State v. Ah Tom*, 8 Nev. 213; *People v. Davis*, 56 N. Y. 95; *Sheppard v. Yoakum*, 10 Or. 402; *People v. Farrell*, 11 Utah, 414, 40 Pac. 703.)

Proof of other distinct and disconnected crimes of the same character by defendant is not admissible. (McClain's Crim. Law, sec. 461; *Janez v. People*, 159 Ill. 440, 42 N. E. 862; *Parkinson v. People*, 135 Ill. 401, 10 L. R. A. 91, 25 N. E. 764; *Towne v. People*, 89 Ill. App. 258; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277.)

"Hearsay evidence cannot be received as proof of age, where the purpose of the evidence is to establish infancy as a defense." (1 Ency. of Evidence, 736; *People v. Mayne*, 118 Cal. 516, 62 Am. St. 256, 50 Pac. 654.)

D. C. McDougall, Attorney General, O. M. Van Duyn, J. H. Peterson, Assistant Attorneys General, and J. L. Richards, Prosecuting Attorney, for Respondent.

Evidence in regard to chastity of an infant complaining witness in rape cases is wholly irrelevant, incompetent and immaterial. (*State v. Anthony*, 6 Ida. 383, 55 Pac. 884; sec. 6082, Rev. Codes.)

It is not necessary that a conspiracy be proved for any particular purpose, but only necessary that a general community of interest and purpose is shown, and declarations are admissible, though conspiracy to commit the offense in question is not proved.

Several successive crimes committed during the conspiracy are merely regarded as parts of one, indivisible whole.

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(Underhill on Criminal Evidence, secs. 491, 493.) In this case, the act charged in the information is but one of the parts of the general conspiracy. Courts are rarely limited in the admission of this kind of testimony, and a wide discretion is vested in the district judge. (Underhill on Criminal Evidence, sec. 494; *State v. Corcoran*, 7 Ida. 220, 61 Pac. 1034; 8 Cyc. 682.)

The general rule is that only the crime charged against the defendant in the information can be proved, but there are exceptions to this rule, and this is one of the exceptions. (*State v. Lancaster*, 10 Ida. 410, 78 Pac. 1081.)

The facts of date and place or proof of birth may be shown by hearsay, or by reputation in the family, or it may be established circumstantially where the original records have been lost. (See sec. 1480, Wigmore on Evidence; 16 Cyc. 1124.)

AILSHIE, J.—The defendant was convicted of the crime of rape, committed on a female under the age of consent.

We shall deal with the exceptions by groups rather than separately.

The court properly sustained the objections to the questions asked by counsel for defendant, as to whether the prosecutrix had ever had sexual intercourse with anyone prior to the time she submitted to that relation with the defendant. The fact that this girl under the age of consent had had intercourse with other men, or even if she had become a common prostitute, would constitute no defense for the defendant. (Underhill on Cr. Ev., sec. 418; 10 Ency. of Ev., secs. 603 and 605; *People v. Abbott*, 97 Mich. 484, 37 Am. St. 360, 56 N. W. 862; *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845; *People v. Wilmot*, 139 Cal. 107, 72 Pac. 838; *People v. Johnson*, 106 Cal. 293, 39 Pac. 622; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 217.) If she was under the age of consent she could not have given legal consent to the violation of her person, and the fact that her person had been unlawfully and criminally violated by another would afford no justification for the defendant committing a like crime.

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It is contended, however, that such evidence ought to be admitted for the purpose of throwing light on her credibility as a witness. While a lewd woman is less likely to be truthful than a chaste woman, still there is not such an immediate connection between unchastity and untruthfulness as to permit a woman's chastity to be called in question every time she goes on the witness stand. If she is to be impeached generally for untruthfulness, it must be done in the statutory way. (Sec. 6082, Rev. Codes.) Jurymen will get a very clear idea of the credibility of the witness from her demeanor and appearance and that mass of circumstances which must always appear to jurors from seeing and hearing a witness while testifying.

On the trial the state introduced evidence of statements and admissions made by Mrs. Hammock, the wife of defendant, some time after the commission of these several acts by him, in which Mrs. Hammock is reported as saying that she knew that the defendant had intercourse with the prosecutrix and that he had done so with other girls. The defendant objected to this evidence as hearsay and incompetent. The evidence was admitted on the theory that a conspiracy existed between the defendant Hammock and his wife, for the purpose of procuring girls to come to their house and thereby more easily enabling the defendant to have sexual intercourse with such girls. It is contended by the state that the conspiracy existed generally, and for the general purposes of illicit intercourse rather than specially with reference to any individual girl. In support of this position taken by the state the prosecutrix testified that Mrs. Hammock wrote for her to come and stay with the Hammocks and go to school, and the state produced a letter which corroborates this statement. The prosecutrix also testified that on the day of her arrival Mrs. Hammock told prosecutrix that Hammock would come to her bed that night and from time to time thereafter, and that she must submit to his wishes, and that if she did not she could not stay there. The evidence also shows that the prosecutrix is the niece of the Hammocks, and had no money with which to pay the fare back to her father's or to secure

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Opinion of the Court—Ailshie, J.

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lodging elsewhere. The state also proved by other witnesses, who were neighbors and acquaintances of the Hammocks, that after this occurrence became noised about Mrs. Hammock told them of the illicit relation, and that they had had girls there for the purpose of gratifying Hammock's lust, and that they tried to get at least one other from Boise; that they never secured an innocent girl for such purpose, but someone who had already become bad and immoral. It appears by the record, if not by positive terms and assertions, then by inference and the trend of the testimony, that Hammock is a sensual man, bent only on the gratification of his lust, and that the wife, either for the purpose of relieving herself and escaping from at least a part of his bestial lust, or from fear and intimidation, lent herself to the plan of procuring girls to come and stay at the Hammock home, so that her husband might the more readily commit these crimes. Much of this story is almost inconceivable, but its credibility rested with the jury, and there was clearly enough, if it was to be believed at all, to go to the jury for the purpose of establishing a conspiracy. The fact that the wife herself was physically incapable of committing the rape would not prevent her becoming a conspirator to aid the accomplishment of the criminal design by the husband. (*State v. Jones*, 83 N. C. 605, 35 Am. Rep. 586; *Kessler v. Commonwealth*, 12 Bush (Ky.), 18; McLain Cr. Law, sec. 449; 1 Bishop Cr. Law, sec. 689.) If a conspiracy has been established, it is reasonable to believe that it was general, as contended by the state. If it was general, then the statements and declarations made by Mrs. Hammock after this specific crime was committed and during the existence of the common design were admissible as coming from a co-conspirator.

The evidence submitted by the state was sufficient to justify the jury in finding that the prosecutrix, Mary Lois Jones, was under the age of consent at the time of the commission of the alleged crime.

The evidence as to the commission by the defendant of other like crimes was not inadmissible, as it occurred in this case. This evidence developed while the state was proving

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**Points Decided.**

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the statements and declarations made by Mrs. Hammock with reference to this specific crime, and the conduct and habit of the defendant in the accomplishment of the general purpose of gratifying his lust on this and other girls, and to the furtherance of which purpose and design Mrs. Hammock seems to have lent her aid and assistance. Any evidence of other crimes which developed was so intimately and inseparably connected with the circumstances of this specific offense as to render it admissible as a part of the common criminal design, all of which was necessarily admissible in order to get a clear understanding of the situation of the parties and the probable truth or falsity of this charge.

We find no error that calls for a reversal of this judgment. The judgment should be affirmed, and it is so ordered.

Sullivan, C. J., concurs.

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(July 28, 1910.)

**CADDIE BATES, Appellant, v. CAPITAL STATE BANK  
and M. P. MEHOLIN, Receiver, Respondents.**

[110 Pac. 277.]

**COMPLAINT—DEMURRE—CAUSE OF ACTION—PROPERTY—DEPOSIT WITH  
BANK OR BANKER—DEMAND—STATUTE OF LIMITATIONS.**

(Syllabus by the court.)

1. Under the provisions of sec. 4168, Rev. Codes, the complaint must contain, among other things, a statement of the facts constituting the cause of action in ordinary and concise language and a demand for the relief claimed.
2. *Held*, that this is in form an action in replevin or claim and delivery under the provisions of the statute of Idaho.
3. The technicalities of pleading under the common law have been dispensed with by the provisions of our code.
4. Implications of law arising from facts alleged in the complaint and presumptions of law arising therefrom need not be pleaded.
5. *Held*, that the complaint states a cause of action.



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Argument for Appellant.

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6. A bailee who receives property as a deposit for safekeeping is bound to deliver it to the bailor upon demand, unless he has a lien on it, or is prevented from so doing by the real owner or act of law.

7. In an action against a depository, the burden is on the depositor to prove the bailment and failure or refusal to return the property on demand. If that is shown, it then becomes incumbent upon the depository to return the same or show sufficient circumstances or facts that would excuse him in law for refusing.

8. A "deposit" is a naked bailment of goods to be kept for the depositor without reward and to be returned when he shall demand it.

9. Where a bank or banker receives property upon deposit, there results an implied contract that he will return it to the depositor upon demand.

10. Under the provisions of sec. 4059, Rev. Codes, where an action is brought to recover money or property deposited with a bank or banker, the statute of limitations does not begin to run until after demand by the depositor.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action to recover possession of certain railroad bonds or their value in case a return cannot be had. Demurrer to the complaint on the ground that it does not state a cause of action, and other grounds, sustained by the trial court. *Reversed.*

Jackson & Taylor, for Appellant.

Under the provisions of our code the technicalities of pleading have been dispensed with, and the plaintiff need only state his cause of action in ordinary and concise language. (*Rauh v. Oliver*, 10 Ida. 3, 70 Pac. 20; *Elliott v. Collins*, 6 Ida. 266, 55 Pac. 301.)

It never has been the practice of this court to require the plaintiff to set up implications or presumptions of law. (1 *Estee's Pleadings*, secs. 185, 186.)

Under the code procedure, where facts are alleged from which the law will imply a promise, it is not necessary to allege a promise in terms, such allegation being a mere conclusion of law. (*Wilkins v. Stidger*, 22 Cal. 232, 83 Am. Dec.

## Argument for Respondents.

64; *Boston Clothing Co. v. Garland*, 90 Minn. 520, 97 N. W. 433; *Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549; *Waite v. Willis*, 42 Or. 288, 70 Pac. 1034; *De La Guerra v. Newhall*, 55 Cal. 21.)

"Ultimate facts only should be pleaded and not probative facts or conclusions of law." (*Orman v. City of Pueblo*, 8 Colo. 292, 6 Pac. 931; 1 *Estee's Pleadings*, sec. 190; *Green v. Palmer*, 15 Cal. 412, 76 Am. Dec. 492.)

"A complaint is not defective in substance for omitting to state conclusions to be implied from the facts sufficiently stated." (*Case v. Carroll*, 35 N. Y. 385.)

In an action against a depository, the burden is on the depositor to prove the bailment and a failure or refusal to return the property on demand. If a failure or refusal to return the property on demand is shown, it becomes incumbent upon the depository to return the same. (*Dart v. Lowe*, 5 Ind. 351; *Darling v. Younker*, 37 Ohio St. 487, 41 Am. Rep. 532; 13 Cyc. 810; *Davis v. Tribune Job Printing Co.*, 70 Minn. 95, 72 N. W. 808.)

"The depositor makes a *prima facie* case when he shows a deposit and a demand and a refusal of the thing deposited. The *onus* is then upon the depository to exonerate himself of the liability." (*Wiser v. Chesley*, 53 Mo. 547; *Huxley v. Hartzell*, 44 Mo. 370; *Kincheloe v. Priest*, 89 Mo. 240, 58 Am. Rep. 117, 1 S. W. 235; *Thompson v. St. Louis etc. R. Co.*, 59 Mo. App. 37; *Siems v. Bank*, 7 S. D. 338, 64 N. W. 167.)

Wyman & Wyman, and Pence & Tennyson, for Respondents.

The complaint is fatally defective when it fails to show plaintiff to be entitled to the possession of the chattel sought to be replevied. (*Cameron v. Wentworth*, 23 Mont. 70 (78), 57 Pac. 648; *Midland Contracting Co. v. Toledo Foundry etc. Co.*, 154 Fed. 797, 83 C. C. A. 489; *Bierman v. Reinborn*, 71 N. J. L. 422, 58 Atl. 1083; *Wood v. Orser*, 25 N. Y. 348; *Scofield v. Whitelegge*, 49 N. Y. 259; *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84; *Lane v. Chadwick*, 146 Mass. 68, 15 N. E. 121; *Richbourg v. Rose*, 53 Fla. 173, 125 Am. St. 1061, 44 So. 69, 12 Ann. Cas. 274; *Eldridge v. Sherman*, 70

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Mich. 266, 38 N. W. 255; *Castro v. Murray*, 47 Or. 57, 81 Pac. 388, 883; *Ferguson v. Lauterstein*, 160 Pa. 427, 28 Atl. 852; *Bogard v. Jones*, 28 Tenn. 739; *Jimmerson v. Greene*, 7 Neb. 26; *Cassell v. Western Stage Co.*, 12 Iowa, 47; *Lamotte v. Wisner*, 51 Md. 543; *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 694; *Metal Co. v. Daugherty*, 204 Mo. 71, 102 S. W. 538; *Linsay v. Wyatt*, 1 Ida. 738; *Cunningham v. Stoner*, 10 Ida. 557, 79 Pac. 228; *Idaho Placer Min. Co. v. Green*, 14 Ida. 249, 93 Pac. 954.)

Replevin can only be maintained against one actually in the possession or control of the chattels or one who, anticipating the suit, disposes of them to defeat the action. (Shinn on Replevin, sec. 164; *Robb v. Dobrinski*, 14 Okl. 563, 78 Pac. 101, 1 Ann. Cas. 981; *De Priest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320; *Timp v. Dockham*, 32 Wis. 146 (151).)

“To entitle a person to maintain trover, he must not only have a special or general property in the chattel, but also must have been in possession or entitled to immediate possession thereof at the time of the conversion.” (28 Am. & Eng. Ency. of Law, 659, where the cases are collated; *Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414.)

The allegation of breach of contract is insufficient as against a special demurrer. It does not allege the bonds have not been returned nor does it state that plaintiff is not in possession of them. (*Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882.)

Upon the strict doctrine that this is an action in replevin, three years after the deposit would be the limit within which an action might be brought. (*Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24.)

SULLIVAN, C. J.—This action was brought to recover the possession of twenty-one first mortgage bonds of the Pacific and Idaho Northern Railway Co., or their alleged value of \$29,496.25.

It is alleged in the complaint that said bonds were deposited with the Capital State Bank of Idaho on the 23d of August,

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Opinion of the Court—Sullivan, C. J.

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1901; that each and every of said bonds were at the time of the deposit and ever since have been and now are the sole and separate property of the plaintiff; that on the 3d of January, 1910, plaintiff served a written demand on the defendants, the defendant M. P. Meholin being the receiver of said bank, whereby she demanded immediate delivery to her of said bonds, or in the event of the inability of the defendants to deliver the same, the value thereof, alleged to be the sum of \$29,496.25. It is also alleged that said demand is the first and only demand made by plaintiff for the return of said bonds or the value thereof or any portion of the same; that after making said demand, the said bank and the said receiver neglected, failed and refused to return said bonds or any of them to the plaintiff or their value or any portion of the same, and on information and belief, it is alleged that said bonds and each of them or the value thereof have remained on deposit with said defendant bank and in the custody thereof, and ever since they were deposited in said bank and now are in the custody of said Meholin as receiver. The prayer is for judgment against the defendants for the return of said bonds, and if return cannot be made, for judgment for their value with accruing interest and the costs of action and for other relief.

To this complaint the defendants interposed a demurrer, on the ground that it does not state facts sufficient to constitute a cause of action; that the action is barred by the provisions of secs. 4052, 4053 and 4054 of the Rev. Codes, and other grounds.

Said demurrer was sustained by the court, and thereupon plaintiff elected to stand upon the complaint and judgment of dismissal was entered against her. This appeal is from said judgment.

There are several specifications of error assigned. There are, however, but two questions involved in this controversy; First, does the complaint state a cause of action, and, second, is the action barred by the statute of limitations?

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Opinion of the Court—Sullivan, C. J.

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First, it is contended by counsel for respondent that this is an action in replevin, and comes under the provisions of our statute in regard to the claim and delivery of personal property, and it is contended that the complaint does not state a cause of action, because it nowhere is alleged therein that the plaintiff is entitled to the immediate possession of said bonds.

This is clearly an action for the recovery of possession of personal property, to wit, said bonds, and is in form the common-law action of replevin, or an action in "claim and delivery" as designated by the provisions of our statute, secs. 4271 to 4282, inclusively, of the Rev. Codes. As to whether or not the plaintiff has availed herself of the provisional remedy provided by the statute does not appear by the record, but that fact is immaterial in the consideration of the questions presented on this appeal. Whatever name or designation might be given to this specific action, it still remains a fact that the action was instituted primarily for the recovery of the specific personal property described in the complaint, or its value, and the sufficiency of the pleading must be determined upon the facts pleaded rather than upon any name given to the pleading or the cause of action.

In *Rauh v. Oliver*, 10 Ida. 3, 70 Pac. 20, this court held under the provisions of our Code of Civil Procedure that the technicalities of pleading under the common law have been dispensed with, and that the plaintiff need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trespass or ejectment, without regard to the ancient forms of pleading, and that the plaintiff can be sent out of court only when, upon his facts, he is entitled to no relief either at law or in equity.

In *Elliott v. Collins*, 6 Ida. 266, 55 Pac. 301, the court said: "Under the provisions of subd. 2, sec. 4168, in actions *ex contractu* or *ex delicto*, the pleader is required to make in his complaint a statement of the facts constituting the cause of action in ordinary and concise language." (See, also, sec. 4168, Rev. Codes.)

## Opinion of the Court—Sullivan, C. J.

Implications of law arising from the facts stated need not be pleaded and presumptions of law need not be averred. Under our code procedure, where all of the facts are alleged from which the law will imply a promise, it is not necessary to allege a promise in terms, as such allegation would be a mere conclusion of law. (*Wilkins v. Stidger*, 22 Cal. 231; *Boston Clothing Co. v. Garland*, 90 Minn. 520, 97 N. W. 433; *Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549; *Waite v. Willis*, 42 Or. 288, 70 Pac. 1034; *Abadie v. Carrillo*, 32 Cal. 172; *De La Guerra v. Newhall*, 55 Cal. 21.) One of the implications of law which arises from the facts alleged is that the plaintiff is entitled to the immediate possession of said bonds, and that implication need not be averred in terms.

In the complaint it is alleged that the bonds referred to were deposited with the Capital State Bank as a bank and banker; that they were the property of the plaintiff and she had made demand on said bank and its receiver therefor. The plaintiff stated a cause of action in her complaint, as under the law a bailee who receives property as a deposit is bound to deliver it to the bailor upon demand, unless he has a lien on it, or is prevented from so doing by the real owner or the act of law, and has given the notice required by statute. (*Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.)

In an action against a depositary, the burden is on the depositor to prove the bailment and a failure or refusal to return the property on demand. If a failure or refusal to return the property on demand is shown, it becomes incumbent upon the depositary to return the same, or show satisfactory explanatory circumstances or facts in defense. (*Dart v. Lowe*, 5 Ind. 131; *Jackson v. Eiglimie*, 27 N. Y. State Weekly Digest, 193; *Darling v. Younker*, 37 Ohio St. 487, 41 Am. Rep. 532; 13 Cyc. 810.)

It was held in *Wiser v. Chesley*, 53 Mo. 547, that a depositor makes a *prima facie* case when he shows a deposit made and a demand and refusal of the thing deposited. The onus is then upon the depositary to exonerate himself from the liability which attached when he assumed custody of the article

## Opinion of the Court—Sullivan, C. J.

with which he was intrusted. (See, also, *Davis v. Tribune Job Printing Co.*, 70 Minn. 95, 72 N. W. 808.)

It is alleged in the complaint that the plaintiff "deposited" with the defendant, the Capital State Bank of Idaho, certain bonds. Thus a "deposit" is alleged to have been made with a bank or banker. In Jones on Bailment, sec. 36, "deposit" is defined to be "A naked bailment of goods to be kept for the bailor without reward and to be returned upon demand." In Edwards on Bailments, 2d ed., sec. 10, p. 14, "deposit" is defined as follows: "A delivery of goods to be kept and returned without recompense creates a bailment; it is called a deposit." 13 Ency. of Law & Procedure, p. 789, defines deposit as "A naked bailment of goods, to be kept for the depositor without reward, and to be returned when he shall require it." (See, also, authorities there cited.) In Edwards on Bailments, 2d ed., p. 62, the duty of the depositary is declared as follows: "It is the depositary's duty to restore the goods on demand; where he fails to do so, he is bound to render some account of them."

The "deposit" alleged in the complaint is a naked bailment of the bonds in question. The depositor having alleged the deposit of the bonds, the demand therefor, the refusal by the depositary to make a return of the property so deposited, a cause of action is stated, and it then devolved upon the respondents to plead a good and valid reason for failure and refusal to return the same as a defense to such action, if he has any. From the facts alleged, the implication of law instantly arises that the deposit was made for safekeeping, and that the depositary promised to return the deposit on the first authorized demand or requirement by the depositor, and that immediately on demand the depositor was entitled to the possession of the thing deposited. The plaintiff stated a cause of action when he alleged a "deposit" and a demand and a refusal to return the thing deposited. The onus was then upon the depositary to exonerate himself of the liability.

In *Siems v. Bank*, 7 S. D. 338, 64 N. W. 167, the court said:

"It must be remembered that the promise on which the action rests is not the direct act of the parties, but a promise

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Opinion of the Court—Ailshie, J., on Petition for Rehearing.

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which the law implies from the facts on the theory that a party is willing and undertakes to do what he ought to do.”

Where a bank receives either money or property upon deposit, there is at least an implied contract that he will return it to the depositor upon demand. (See 2 Page on Contracts, sec. 771; *Waite v. Willis*, 42 Or. 288, 70 Pac. 1034.)

The other assignment of error has reference to the statute of limitations. Under the facts as alleged in the complaint, the statute of limitations did not begin to run until the demand for the deposited property had been made. That demand was made on the 3d day of January, 1910, and this action was begun on March 14, 1910. Sec. 4059, Rev. Codes, provides as follows:

“To actions brought to recover money or property deposited with any bank, banker, trust company, or saving and loan society, no limitation begins to run until after an authorized demand.”

Said bonds were “property”; they were deposited with the bank or banker; hence under the provisions of said section the limitation of the time in which to bring this action did not begin to run until after the demand was made. Such is the rule in many states.

We therefore hold that the complaint states a cause of action and that the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded, with direction to the trial court to overrule the demurrer and to permit the defendants to answer. Costs are awarded to the appellant.

Ailshie, J., concurs.

(August 9, 1910.)

ON PETITION FOR REHEARING.

‘AILSHIE, J.—A petition for rehearing has been filed in this case in which counsel for respondents urge upon the court the importance of deciding in this case whether an “action in replevin can be maintained against one not in possession



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Points Decided.

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of the property at the time of the commencement of the action." That question does not arise upon the record as it comes to this court, and in our judgment is not properly presented and does not require our consideration on this appeal. We did not consider that question in the decision of this case, and we withhold any opinion on it at this time.

The petition will be *denied*, and it is so ordered.

Sullivan, C. J. concurs.

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(July 29, 1910.)

WILLIAM E. WILSON et al., Appellants, v. ANTHONY  
D. LINDER et al., Respondents.

[110 Pac. 274.]

ACTION TO DETERMINE ADVERSE CLAIM—"RULE IN SHELLEY'S CASE"—  
CONSTRUCTION OF WILL—LIFE ESTATE—CONTINGENT REMAINDER.

(Syllabus by the court.)

1. Under the provisions of sec. 4538 of the Rev. Codes, an action may be maintained by a remainderman for the protection of a contingent remainder as against one who claims an estate or interest in the property adverse to such remainderman.

2. Under the provisions of sec. 3076 of the Rev. Codes, the common-law rule, generally known as the "Rule in Shelley's Case," has been abrogated, and the term "heirs" has been changed from a word of limitation to one of purchase.

3. The cardinal rule to be applied in the construction of a will is to gather the intent of the testator from the language he has employed in the will, and this intent is to be ascertained from a full view of everything within the "four corners of the instrument." This rule must be understood and applied in connection with that other rule to the effect that a clearly expressed intention in one portion of the will is not to yield to a doubtful construction in another portion of the instrument.

4. Where a testator provided by a will as follows: "My son Jesse shall have the home place. [Here follows a description of the property.] . . . But should my son Jesse die without any wife

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Argument for Appellants.

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or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike"—*held*, that the devisee, Jesse Wilson, took a limited estate only, subject to the vesting of an absolute and fee simple title on his leaving surviving him at the time of his death a wife or child, and that the remaindermen had only an expectancy which might be vested in them as an absolute estate upon the contingency of Jesse Wilson dying without either wife or child.

5. Where a contingency named in a will upon which an absolute estate may vest in one devisee as against another is unlimited as to time and is such a contingency as may never occur either prior or subsequent to the death of the testator, and may also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee.

APPEAL from the District Court of the Third Judicial District, for the County of Ada. Hon. Fremont Wood, Judge.

Action by plaintiffs to determine the respective interests of several parties to real estate. Judgment for defendant. Plaintiffs appeal. *Reversed*.

Cavanah & Blake, and E. J. Dockery, for Appellants.

The provisions of sec. 4538, Rev. Codes, are very broad, and authorize any person, whether in possession or out of possession, whether holding the legal title or equitable title, to bring his action against another who claims an estate in real property adverse to him, and he may in such action have the adverse claim determined and settled. (*Coleman v. Jagers*, 12 Ida. 125, 118 Am. St. 207, 85 Pac. 894; *German-Am. Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A., N. S., 1066.)

The rule in *Shelley's Case* has been abrogated by sec. 3076, Rev. Codes, which is identical with sec. 779, Civil Code of Cal. (*Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030.)

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Argument for Respondents.

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Even in states where the rule in Shelley's Case still obtains it has been held that words of similar import to that contained in the will in the case at bar convey to the first taker only a life estate. (*Nes v. Ramsay*, 155 Pa. 628, 26 Atl. 770; *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565; *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231. See, also, *Golladay v. Knock*, 235 Ill. 412, 126 Am. St. 224, 85 N. E. 649; *Cousino v. Cousino*, 86 Mich. 323, 48 N. W. 1084; *Dunn v. Sargent*, 101 Mass. 336.)

The only possible persons who could be injured by the petitioner's not giving a bond would be the executor and the creditors of the estate. The facts show that the creditors could not possibly be injured, and this being true, of course the executor could not be injured.

"The question whether a bond should be given by any of the parties to a partial distribution is one entirely within the discretion of the court below." (*In re Levinson's Estate*, 98 Cal. 654, 33 Pac. 726.)

Ira E. Barber, for Respondents.

The will in this case devised an absolute estate to Jesse Wilson. "Shall have" passes the absolute interest of the testator. (*Fairclaim v. Guthrie*, 1 Call (Va.), 7; *Chapman v. Turner*, 1 Call (Va.), 280, 1 Am. Dec. 514.)

Having vested an absolute estate, in order to limit it or diminish it requires words as certain and unequivocal as those used in vesting the estate, and the words, "die without wife or children" as used in this will referred to a death of devisee during the lifetime of the testator. (*Reeves v. School Dist.*, 24 Wash. 282, 64 Pac. 752, and cases cited; *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 585, 27 L. ed. 1089; *McClellan v. MacKenzie*, 126 Fed. 701, 61 C. C. A. 619; *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666; *Eberts v. Eberts*, 42 Mich. 404, 4 N. W. 172; *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049; *In re Herrick's Estate*, 12 N. Y. Supp. 105; *Davis v. Davis*, 118 N. Y. 411, 23 N. E. 568; *Bailey v. Ross*, 66 Ga. 354; *Kelly v. Meins*, 135 Mass. 231;

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Argument for Respondents.

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*Prosser v. Hardesty*, 101 Mo. 593, 14 S. W. 628; *Fields v. Whitfield*, 101 N. C. 305, 7 S. E. 780.)

"Be distributed" in a will gives a vested fee. (*Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *In re Creighton*, 12 Neb. 280, 11 N. W. 313; *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30, 32 L. ed. 415; *Thomson v. Tracy*, 60 N. Y. 174-180.)

Courts in all cases of doubt construe conditions as subsequent rather than precedent, so that the estate may vest at the earliest possible moment. (1 Dembetz on Land Title, 23-160.)

A grantor cannot destroy his own grant, however much he may modify it or load it with conditions. One having granted an estate in a deed, no separate clause, even in the same deed, can operate to nullify it. (2 Devlin on Deeds, 2d ed., 838a; *Maker v. Lazell*, 83 Me. 562, 23 Am. St. 795, 22 Atl. 474; *Cosby v. Newby*, 30 Ky. Law Rep. 1375, 101 S. W. 306; *Crews v. Glasscock*, 32 Ky. Law Rep. 913, 107 S. W. 237; *Wilkins v. Norman*, 139 N. C. 40, 111 Am. St. 767, 51 S. E. 797.)

The intent of the testator does not always govern the construction of wills. There are rules of law which control their construction. (*Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S., 1028, 11 Ann. Cas. 343; *Ide v. Ide*, 5 Mass. 500; *Jackson v. De Lancey*, 13 Johns. (N. Y.) 538, 552, 7 Am. Dec. 403.)

The estate cannot be construed to be a life estate because there are no words of limitation sufficient to limit it to that kind of a tenure. The proper words to be used in creating a limitation are "while," "as long as," "until" and "during." (*Vanatta v. Brewer*, 32 N. J. Eq. 268, 6 Morr. Min. Rep. 358.)

Where a granting clause conveys in fee simple, a subsequent clause that the land shall revert on the death of one of the grantees is void. (*Palmer v. Cook*, 159 Ill. 300, 50 Am. St. 165, 42 N. E. 796; *Marsh v. Morris*, 133 Ind. 548, 33 N. E. 290.)

One who has no title to land cannot maintain a bill to remove a cloud from the title. (*Coel v. Glos*, 232 Ill. 142, 83 N. E. 529, 15 L. R. A., N. S., 413; *Pulliam v. Cherokee etc. Co.*, 52 Cal. 605; *Cox v. Bird*, 65 Ind. 277.)

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Opinion of the Court—Ailshie, J.

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The court must, in order to give integrity to its orders, follow the statute strictly. (*Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15; *Letellier's Estate*, 74 Cal. 311, 15 Pac. 847; *Alcorn v. Brandeman*, 145 Cal. 62, 78 Pac. 343; *Baker v. Wood*, 42 Ala. 664; *Pearson v. Pearson*, 46 Cal. 611; *In re Austin's Estate*, 50 Hun. 604, 2 N. Y. Supp. 875; *Grafenreid v. Kundert*, 23 Ill. App. 440.)

AILSHIE, J.—This action was commenced for the purpose of determining an adverse claim to certain real property. It is alleged in the complaint that James Wilson died in Ada county in March, 1899, leaving a last will and testament which was thereafter duly admitted to probate; that William E. Wilson, Charlotta Calhoun, Emma Linder, Lizzie Everett, and Jesse Wilson, all of whom are sons and daughters of James Wilson, and Myrtle Goble, a grand-daughter, are named in the will as devisees and legatees of the testator; that, among other things, the will provided as follows: "That my son Jesse shall have the home place. [Then follows description.] . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike." During the course of administration, application was made for a decree of partial distribution, and the petition was granted and the decree was entered by virtue of which the real estate described in the complaint herein and involved in this litigation was distributed to the parties entitled thereto in accordance with the terms and conditions of the will and in the identical language of the will itself. It is further alleged that one of the devisees, Lizzie Everett, has conveyed all her interest in the property described to Norman Gratz, and that the plaintiffs are the owners of and entitled to an undivided three-fourths interest in the property in controversy, subject only to the conditions of the will, namely, that if Jesse Wilson should die without leaving a wife or child, the property mentioned and described shall be equally divided between the other devisees named in the will.

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It is further alleged that for the purpose of preventing William E. Wilson, Charlotta Calhoun, and Lizzie Everett, and their heirs and successors in interest, from holding or acquiring an undivided three-fourths interest in the property described in the complaint in the event of the death of Jesse Wilson without leaving surviving him a wife or child, the defendants, Anthony V. Linder and Emma Linder, have secured a pretended deed from the said Jesse Wilson purporting to convey a fee simple title to the land described in the complaint to themselves; and that for the further purpose of defeating the title of William E. Wilson, Charlotta Calhoun and Lizzie Everett in the land described and in collusion with Jesse Wilson, the defendants have permitted the land to be sold for delinquent taxes, and thereby secured a pretended tax title by virtue of which they claim a fee simple title to the whole tract of land.

It is also alleged that for the further purpose and intention of defeating the title of the devisees and plaintiffs herein, defendants have made and executed a pretended mortgage on the land described in the sum of \$10,000 in favor of the defendant Robert Noble.

The prayer of the complaint is that the defendants be required to come in and set up their claim and interest in the property, and that the title to the property be adjudicated and decreed, and that it be adjudged and decreed that the plaintiffs have a contingent interest in the property, the vesting of title to which is dependent upon Jesse Wilson dying without leaving surviving him a wife or child. Defendants demurred to the complaint on the ground that it did not state a cause of action. The demurrer was sustained, and this is an appeal from the judgment.

The first question presenting itself to our consideration is the contention made by the respondent that the plaintiffs do not show such an interest as will entitle them to maintain the action. Now, it must be conceded that if the complaint shows any interest in the plaintiffs whatever to the land described it is only a contingent remainder. (Sec. 3075, Rev. Codes.) Their expectancy in this property is subject to

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be defeated upon the death of Jesse Wilson leaving surviving him either a wife or child, or, to put the question another way, the interest of the plaintiffs can only vest upon the death of Jesse Wilson without leaving surviving him a wife or child. Under the provisions of our statute (sec. 4538, Rev. Codes), "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

In *Coleman v. Jagers*, 12 Ida. 125, 118 Am. St. 207, 85 Pac. 894, this court said: "The provisions of said section 4538 of the Revised Statutes above quoted are very broad, and under them any person, whether in possession or out of the possession, whether holding the legal title or equitable title or what not, may bring his action against another who claims an estate in real property adverse to him, and may in such action have the adverse claim determined and settled. . . . The provisions of sec. 4538 of the Revised Statutes, and the decisions of this court in *Shields v. Johnson*, 10 Ida. 476, 79 Pac. 393, 3 Ann. Cas. 245, *Johnson v. Hurst*, 10 Ida. 308, 77 Pac. 784; *Fry v. Summers*, 4 Ida. 424, 39 Pac. 1118, settle this contention, for under them we think every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action of this kind."

It follows from the authority of the foregoing cases that if the plaintiffs have any interest in this property, either contingent or expectant, they may maintain an action to determine any adverse claim or interest thereto. (*German-American Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932.)

The next question to be determined is whether under the will of James Wilson, Jesse Wilson took a fee simple title to this property or a lesser estate therein. It is conceded that at common law, under what is generally known as the "Rule in Shelley's Case," the language of this will passes a fee simple title in the property to the devisee. It is contended, however, by counsel for appellant that the "Rule in Shelley's Case" has been abrogated by sec. 3076 of the Rev. Codes of this state. That section provides as follows:

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“When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder, so limited to them, and not as mere successors of the owner for life.”

The foregoing section of our statute is identical with sec. 779 of the Civil Code of California, and was evidently copied from the California statute. In *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049, the supreme court of California had occasion to construe the provisions of sec. 779 of their Civil Code, and among other things said:

“The effect of this section is to abrogate the rule in Shelley’s case, and, with other sections in the Civil Code, to furnish the rules by which to determine the estate or interest in the lands which the plaintiff took by virtue of the grant. (Civ. Code, sec. 4.) Sec. 1105 declares that ‘a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended’; and, if it does appear from the grant that a lesser estate was intended, no such presumption exists. A grant is to be interpreted in the same manner as any other contract (sec. 1066), so as to give effect to the intention of the parties, if that intention can be ascertained (sec. 1636); and, for the purpose of ascertaining that intention, ‘the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ . . . . By sec. 779, Civ. Code, the term ‘heirs’ is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (*Id.*, sec. 690), and therefore denominated a ‘future interest,’ is, nevertheless, an estate in the property



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capable of being transferred in the same manner as a present interest. (Id., sec. 699.)”

Whether the construction of the provisions of sec. 3076, Rev. Codes, will have any bearing on the ultimate conclusion to be reached in this case will depend on the interpretation given to the language of the testator as used in the will here under consideration.

We now turn our attention to the consideration of the will itself for the purpose of ascertaining the intent of the testator. We approach this inquiry in the light of the general rule for the construction of wills, namely: That the intent of the testator as gathered from the language he has employed in the will is the cardinal rule to be applied in the construction of the will, and this intent is to be ascertained from a full view of everything within “the four corners of the instrument.” (*Whiting v. Whiting*, 42 Minn. 548, 44 N. W. 1030; *Holt v. Wilson* (Kan.), 108 Pac. 87; *Reeves v. School Dist. No. 59*, 24 Wash. 282, 64 Pac. 752.) In the outset, however, respondent insists that where a will contains a clearly expressed intention on the part of the testator to confer an absolute and fee simple estate on the devisee, such intent cannot yield to any subsequent limitation although contained in the same instrument. That contention is certainly true where the testator gives in clear and unambiguous terms an absolute and fee simple estate, and the subsequent limitation or reservation is inconsistent with the estate devised. In such case the subsequent limitation must give way to the fee. (*Bernstein v. Bramble*, 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S., 1028, 11 Ann. Cas. 343; *Ide v. Ide*, 5 Mass. 500; *Jackson v. De Lancy*, 13 Johns. (N. Y.) 538, 7 Am. Dec. 403.)

We think the rule is correctly stated by the text-writers and many authorities as follows: “Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down or diminished by any subsequent, vague and general expressions” (Underhill on Wills, sec. 689); or as said by Redfield, “A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion

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of the instrument.” (1 Redfield on Wills, chap. 9, sec. 30c; *Holt v. Wilson* (Kan.), 108 Pac. 87; *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965; *Lohmuller v. Mosher*, 74 Kan. 751, 87 Pac. 1140, 11 Ann. Cas. 469; *Byrnes v. Stillwell*, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241; *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 388.) In other words, the rule adopted by many courts and as we believe the one more reasonable, when stated conversely, is substantially as follows: “When the limitation is clear and unmistakable, it is to be taken and considered in determining the intent of the testator, and the whole instrument must be considered together in determining the character and extent of the estate given.”

In the light of these principles and rules of law, we turn to the provision of the will now under consideration to ascertain the intent and purpose of the testator as therein expressed. He first says: “My son Jesse shall have the home place.” This is immediately followed by the limitation, “But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children,” etc. It is contended that the words “shall have” pass an unqualified fee simple estate. It may be conceded for the purposes of this case that these words, standing alone, unlimited and unqualified, are sufficient to pass an absolute estate. (*Lessee of Fairclaim v. Guthrie*, 1 Call (Va.), 7; *Chapman v. Turner*, 1 Call (Va.), 280, 1 Am. Dec. 514; *Franklin v. State*, 52 Ala. 414; *George v. Green*, 13 N. H. 521.) These words, however, immediately followed by the modification must be considered in view and in light of the words thus modifying and limiting the estate given. A testator can no more readily than anyone else express his full purpose and intent in one sentence—he cannot devise and limit an estate in one and the same word, phrase, clause or sentence. He must express his intention in words, and each person adopts his own peculiar methods of expressing himself. The duty of the law is to discover his intent as conveyed by the language employed. Had the words “without any wife or children” been omitted from this sentence employed in this will, then it would have been the clear intent of the testator

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to refer to the death of Jesse Wilson as taking place prior to the death of the ancestor, because to attempt to give it any different construction would be to render the language meaningless. That Jesse Wilson would die some time, either before or after the death of the testator, was self-evident and axiomatic, but that he would die prior to the death of the testator was uncertain and problematic. Since, however, the testator saw fit to insert the words "without any wife or children," and thereby designate the condition and circumstance under which the death of Jesse Wilson should vest a fee simple estate, and since that condition may as readily occur subsequent to the death of the testator as prior, *and may also fail to ever occur*, it would therefore be robbing the limitation of the greater portion of its meaning and scope of operation to *limit it to the period of time prior to the death of the testator*. There can be no room for reasonable doubt but that the testator here meant to give his son Jesse Wilson a limited or qualified fee in the home place subject to divestiture on the death of Jesse Wilson without leaving surviving him a wife or child. It is therefore clear to us that the plaintiffs have a contingent remainder in this estate which may be defeated upon the happening of the contingency named in the will which was intended by the testator to vest the absolute fee to the estate. (Secs. 3062, 3072 and 3075, Rev. Codes; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231.) Upon the death of the devisee leaving surviving him a wife or child, the limitation or qualification will instantly be removed and the fee will be left absolute. If, on the other hand, he die without leaving surviving him a wife or child, this base or qualified fee will be instantly terminated and the unqualified fee will be vested by the terms of the will in the other brothers and sisters therein named.

It is also contended by respondent that the decree of distribution made by the probate court in this matter under secs. 5621 and 5624, Rev. Codes, is void for the reason that no bond was required. Whatever the error might be in not requiring a bond in case of a partial distribution under secs.

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5621 and 5624, Rev. Codes, it can make no difference to respondents in this case, for the reason that the language of the order is in identically the same words as the will, and they and their grantor must rest any claim they have to this real estate on either the provision of the will or the decree. No objection to the failure to give bond is being made by either a creditor or the executor or administrator, and respondents do not claim to be creditors but are claiming the estate through the medium of the will.

The contention over this case in this court has revolved about the right of appellants to maintain their action and the construction of the will under which the parties claim their respective interests to this property. No point has been made and no discussion has been had as to the sufficiency or insufficiency of this complaint to charge fraud, collusion or conspiracy between the respondents and the devisee, Jesse Wilson, in order to have this property sold at tax sale and thereby procure a tax title to the property for the purpose of defeating the expectancy of the appellants. We therefore express no opinion whatever with reference to the sufficiency of the allegations in this respect.

For the reasons hereinbefore given, the judgment in this case must be *reversed*, and it is so ordered, and the cause is hereby remanded. Costs awarded to appellants.

Sullivan, C. J., concurs.

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Argument for Defendant.

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(July 30, 1910.)

CHARLES WATERS, Plaintiff, v. ROBERT N. DUNN,  
Defendant.

[110 Pac. 258.]

PROHIBITION—WRIT OF MANDATE—APPLICATION FOR—CAUSE OF ACTION—  
DEMURRER—INJUNCTION—SUSPENSION PENDING APPEAL—JURISDIC-  
TION OR POWER OF COURT—APPEALABLE ORDER.

(Syllabus by the court.)

1. The court may in its sound discretion suspend the operation of an injunction during an appeal.
2. *Held*, that on an application to enforce an injunction, a court has the authority to deny such application and make an order suspending the operation of the injunction pending an appeal.
3. Whether the order involved in this case is an appealable order, *quære*.
4. *Held*, that the demurrer to the complaint must be sustained on the ground that the complaint does not state a cause of action warranting the issuance of the writs prayed for.

Original proceedings in this court for writ of prohibition and writ of mandate. Demurrer to the complaint sustained.

Kerns & Ryan, for Plaintiff, file no brief.

Gray & Knight, and Chas. L. Heitman, for Defendant.

The order made by the court below was a discretionary order, and is not subject to be revised upon an application either for prohibition or *mandamus*. (*Rust v. Stewart*, 7 Ida. 558, 64 Pac. 222; *Connolly v. Woods*, 13 Ida. 591, 92 Pac. 573; *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632.)

The trial court, if it had jurisdiction to issue the injunction, certainly had jurisdiction to dissolve it or to stay it during appeal. (*Connolly v. Woods*, *supra*.)

The trial court has power to suspend the operation of the injunction pending appeal, and until the rights of the parties

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are determined in the supreme court. (*Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136. 27 L. ed. 888; *Genet v. Canal Co.*, 113 N. Y. 472, 21 N. E. 390; *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398; *National Docks etc. Co. v. Penn. R. Co.*, 54 N. J. Eq. 10, 33 Atl. 219.)

The courts also recognize the right to stay an injunction. (*Whitehouse v. Ry. Co.*, 9 Wash. 558, 38 Pac. 152; *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398; *Lund v. Idaho & W. N. R. Co.*, 48 Wash. 453, 93 Pac. 1071.)

*Mandamus* does not lie to control the discretion of a court or judicial officer; and whatever exceptions there may be to this general rule, it is clear that a court cannot be made by *mandamus* to exercise its discretion in a particular manner. (*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 46 Pac. 383; *Hanson v. Police Jury*, 116 La. 1080, 41 So. 322; *Ex parte Schwab*, 98 U. S. 240, 25 L. ed. 105; *Aycock v. Clark, Judge*, 94 Tex. 375, 60 S. W. 665; *Schwan v. Allen, Judge*, 51 La. Ann. 1842, 26 So. 434.)

SULLIVAN, C. J.—This is an original application to this court for a writ of prohibition prohibiting the defendant judge from arresting the operation of an injunction and for a writ of mandate commanding him to enforce said writ of injunction or to enter an order dissolving the same.

To the petition or complaint the defendant interposed a demurrer on the ground, (1) that the petition does not state facts sufficient to warrant the issuance of either of the writs prayed for; (2) that the court had jurisdiction of the subject matter and the parties; that the order made was an exercise of judicial discretion and therefore the trial court had jurisdiction to make said order; and (3) that several causes of action are improperly united, to wit, one for a writ of prohibition and one for a writ of mandate. The matter was presented and heard on the complaint and demurrer. This application arose from the following facts:

An action was brought by the plaintiff in this proceeding, Charles Waters as plaintiff, against the Washington Water Power Co., defendant, in the district court of Kootenai county.

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In that action, Honorable Robert N. Dunn, judge of the eighth judicial district, on December 30, 1909, entered judgment in favor of the plaintiff in the last-mentioned case, enjoining and restraining said defendant from flooding and overflowing certain lands of the plaintiff, which flooding was by means of obstructions constructed and maintained by said defendant in the Spokane river at Spokane Falls in Kootenai county. It is alleged in the complaint or petition for said writs of prohibition and mandate that on the 4th of June, 1910, the said Washington Water Power Co. commenced, and at all times since said date has continued to violate said injunction by causing the waters to be held back upon the lands of plaintiff; that on June 8, 1910, the plaintiff petitioned the defendant in this proceeding, as such judge, to enforce obedience to said injunction, and counsel for the water power company at the same time moved for a modification of said order and judgment of December 30, 1909, which motion was denied, and by an order dated June 18, 1910, the judge refused to enforce obedience to said injunction and denied said application of plaintiff Waters, and did then and there make an order to the effect that said injunction should not take effect until after the determination by the supreme court of this state of an appeal which was then pending in said court, wherein said Washington Water Power Co. was plaintiff and the said Charles Waters and others were defendants.

It is contended by counsel for petitioner that said order of June 18, 1910, refusing to enforce obedience to said injunction, was and is in excess of the jurisdiction of said defendant judge, in that it deprives the plaintiff of his lawful right of protection for his property, and that plaintiff has no appeal from said order. It is also contended that it is necessary for the protection of the rights of said plaintiff that said defendant, as such judge, should either enforce said injunction or enter an order dissolving the same so as to permit the plaintiff to perfect an appeal from the order dissolving said injunction.

Said injunctive order was made on December 30th, 1909, and after a recitation of the facts, the order is as follows:

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“Now, therefore, it is hereby ordered that the defendant, the Washington Water Power Company, be enjoined and restrained during the pendency of this action from maintaining that certain mechanical contrivance known as a bear-trap on its dam at Post Falls, Idaho; that defendant cease and desist from flooding and overflowing any portion of plaintiff’s said land, said injunction and restraining order to take effect on the 1st day of February, 1910, unless said defendant shall in the meantime commence proceedings in the proper court to condemn the right and power to flood and overflow the lands of the plaintiff described in the pleadings herein, and prosecute said proceedings diligently in accordance with the provisions of the statute in such case made and provided, to wit: Sections 5210 to 5229, both inclusive, and cause three disinterested persons to be appointed as commissioners to assess and determine the damages that said plaintiff may sustain by reason of the condemnation and appropriation of the property described in the pleadings herein, and it is further ordered that upon the payment by the defendant prior to said 1st day of February, 1910, of the amount of damages, so assessed and determined by said commissioners, to the plaintiff, or if the plaintiff refuse to accept the same, then after such amount shall be deposited with the clerk of the court to abide the result of said condemnation action, said defendant may enter upon and take possession of and use said property of plaintiff until the final conclusion of the litigation concerning the same.”

It appears that after said order was made, action was commenced by said water power company for the condemnation of plaintiff’s land; that after certain proceedings were taken in that matter, it was held by the trial court that said water power company had not the right or authority to exercise the right of eminent domain in the condemnation of said land, and judgment was entered against said water power company, from which judgment an appeal was taken to this court. Thereafter the plaintiff, Waters, made the application above mentioned to said court for the enforcement of said injunctive order, and the court denied said order and refused to enforce



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said injunction during the pendency of said appeal and made the following order:

“Orders that the said application of the plaintiff for the enforcement of the order heretofore, to wit, on the 30th day of December, 1909, entered herein, the operation of which said order had been subsequently suspended, be and the same is hereby denied pending the final determination of the right of the defendant company to condemn for overflow purposes the lands of the plaintiff, which said condemnation suit is now pending in the supreme court of the state of Idaho, and entitled The Washington Water Power Company, plaintiff, and Charles Waters et al., defendants, or until the further order of this court.

“It is further ordered that the defendant The Washington Water Power Company pay to the clerk of this court within three days from and after the date hereof the sum of six hundred dollars, to be retained by the said clerk until final determination and decision by the supreme court of the state of Idaho of the question of the right of the said defendant The Washington Water Power Company to condemn the lands of the defendant Charles Waters in said action so pending in the supreme court of the state of Idaho.

“It is further ordered that in case the judgment of this court in said condemnation case shall be affirmed by the supreme court of the state of Idaho that the said sum of six hundred dollars be paid to the defendant Waters in full for all damages to his said lands done by the said defendant The Washington Water Power Company for the year 1910 upon presentation to the clerk of this court of the order of this court directing such payment, provided said Waters will accept the same in full payment and satisfaction of said damages, and if the said Waters shall refuse to accept the said sum of six hundred dollars in full settlement of all damages as aforesaid the said sum of six hundred dollars shall be returned to the said defendant The Washington Water Power Company, on demand, and the determination of the damages which the said plaintiff shall have sustained during the year

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1910, by reason of the maintenance of the said dams of the defendant company shall be ascertained in due course of law.

“It is further ordered that in the event the decision of this court in said condemnation suit shall be reversed in the supreme court of the state of Idaho that said sum of six hundred dollars shall be returned, on demand, to the defendant in this action, the Washington Water Power Company.

“Done in open court this 18th day of June, 1910.

(Signed) “R. N. DUNN,

“District Judge.

“Filed June 18, 1910.”

The matter was presented to this court on the complaint and the demurrer thereto.

It is contended by counsel for the plaintiff that the court had no jurisdiction to make said order of June 18, 1910, and counsel asked for a writ of prohibition, prohibiting the judge or court from enforcing said order, and in the same petition asks for a writ of mandate to compel the judge or court to enforce said injunctive order of December 30, 1909, or to dissolve the same. The question then is: Did the court have jurisdiction to suspend the operation of said injunctive judgment pending an appeal to the supreme court? We find no express authority in the statutes granting such jurisdiction; but where the rights of the parties ought in justice to be preserved in *statu quo* until the issue between them is finally determined on appeal, the court has the inherent power to and may in its sound discretion suspend the operation of an injunction during the appeal. (*Home Fire Ins. Co. v. Dutcher et al.*, 48 Neb. 755, 67 N. W. 766. To the same effect is *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. ed. 888; *Genet v. Del. & H. Canal Co.*, 113 N. Y. 472, 21 N. E. 390; *Carson et al. v. Jansen et al.*, 65 Neb. 423, 91 N. W. 398.)

In *State ex rel. Burrows v. Superior Court*, 43 Wash. 225. 86 Pac. 632, a case somewhat similar to the case at bar, the court in the course of the opinion said:

“If the decree is enforced pending the appeal, defendants may be required to suspend a profitable business at great loss.

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No bond has been given by relators, and none can be required in order to place the permanent injunction in effect. If the relators are successful on the appeal, there is no security for their loss; while, on the other hand, if defendants are successful and the judgment of the lower court should be affirmed, their loss may be recovered, because the trial court will make provision therefor."

In *Genet v. Canal Co.*, *supra*, referring to the power of the court to suspend the operation of a judgment during an appeal, the court said:

"It merely suspends the operation of the judgment until the appellate court shall pass upon the law. While it may be said that the order in some sense interfered with the judgment, by postponing its enforcement, we think this was within the competency of the special term in the exercise of its equitable jurisdiction. The incidental operation of the order in this way does not, we think, work any modification in the judgment, in the sense which precludes the jurisdiction exercised by the special term."

In *Hovey v. McDonald*, *supra*, the court said:

"It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or nonexercise is not an appealable matter."

It is there held that the order made by the trial court in the Hovey-McDonald case would not be an appealable order under the federal practice and statutes.

In 22 Cyc., at p. 970, the author says: "The court may in its discretion suspend the operation of an injunction. . . . And it is within the discretion of the court to stay the oper-

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ation of the decree pending an appeal therefrom until the hearing of the appeal on the merits''; and cites in support of that proposition some of the authorities above cited.

There is no doubt but that the trial court has the power and jurisdiction to suspend the operation of a judgment during the pendency of an appeal, and we think the court had discretionary power in the case at bar to decline to enforce said injunctive judgment and to suspend its operation pending said appeal. In this proceeding, however, the question whether there was an abuse of discretion in said matter cannot be reviewed, as the question here is whether the court had the power or jurisdiction to commit the error, if one were committed.

But it is contended by counsel that it is necessary to have some proceeding begun before a court or judge before its jurisdiction can be set in motion, or before it has any jurisdiction to act, and that, in the matter referred to, no application had been made to suspend the operation of said injunction pending the appeal. Counsel made application for the enforcement of said injunction and the judge denied said application but entered an order suspending the same pending the appeal. That application was sufficient on which to base the order that is questioned in this action. That was a sufficient proceeding to set the jurisdiction of the court in motion to make the order complained of.

Counsel for plaintiff asked this court to decide whether the order involved in this proceeding is an appealable order. The court has not been able to arrive at a definite conclusion upon that matter. One of the justices is clearly of the opinion that it is an appealable order; the other entertains grave doubts as to whether it is or not, and the third member of the court did not sit at the hearing.

The demurrer to the petition must be sustained and it is so ordered, and the writs prayed for are denied. Costs of this proceeding are awarded to the defendants.

Ailshie, J., concurs.

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Argument for Appellants.

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(August 1, 1910.)

ARTHUR C. MORBECK et al., Respondents, v. BRADFORD-KENNEDY CO. et al., Appellants.

[110 Pac. 261.]

APPEAL—STAY OF PROCEEDINGS—SUPERSEDEAS—RECEIVER.

(Syllabus by the court.)

1. Where a judgment was entered holding certain sales and transfers of personal and other property fraudulent and void, and a receiver was appointed to take charge of such property and an appeal was taken by the defendants and an undertaking on appeal in the sum of \$300 was filed, the court has the jurisdiction and power to continue the receivership for the preservation of such property pending the appeal.

An original application to this court for an order declaring the judgment and order appealed from to be superseded by the taking of the appeal. Application *denied*.

McBee & La Veine, Wm. T. Stoll, and B. S. Crow, for Appellants.

While the legislature permits of an appeal from an order appointing a receiver, it does not require any additional bond upon such appeal, except as is provided in sec. 4817. The California legislature has recognized the danger of suspending the power of a receiver during appeal without an additional appeal bond, but our legislature has not. The proceeding is modeled after the proceeding in the following cases: *Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806; *Anderson v. Anderson*, 123 Cal. 445, 56 Pac. 61.

The court is also referred to the case of *Barnes v. Buffalo Pitts Co.*, 6 Ida. 519, 57 Pac. 267.

The following cases hold that an appeal from an order appointing a receiver stays proceedings under the order upon giving the proper undertaking. (*State v. Superior Ct.*, 12 Wash. 677, 679, 42 Pac. 123; *Catlin v. Baldwin*, 47 Conn. 173; *State v. Johnson*, 13 Fla. 33; *Wabash R. Co. v. Dykeman*, 133

## Argument for Respondents.

Ind. 56, 32 N. E. 823; *Cook v. Cole*, 55 Iowa, 70, 7 N. W. 419; *Metropolitan Bank v. Commercial Soap etc. Manufactory*, 48 La. Ann. 1383, 20 So. 899; *Everett v. State*, 28 Md. 190; *Farmers' Nat. Bank v. Backus*, 63 Minn. 115, 65 N. W. 255; *Buckley v. George*, 71 Miss. 680, 15 So. 46; *State v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; *People's Cemetery Assn. v. Oakland Cemetery Co.*, 24 Tex. Civ. App. 668, 60 S. W. 679; *Carter v. Carter* (Tex. Civ. App.) [1897], 40 S. W. 1030; *Virginia etc. Steel etc. Co. v. Wilder*, 88 Va. 942, 14 S. E. 806; *Tornanses v. Melsing*, 106 Fed. 775, 45 C. C. A. 615.)

Robert H. Elder, J. L. McClear, R. E. McFarland, and Hawley, Puckett & Hawley, for Respondents.

An appeal does not suspend the functions of a receiver. In many cases, and this is such a case, it would be dangerous to hold that the receiver's functions are so suspended, and to preserve the estate it may be necessary that the receivership be continued. (*In re Real Estate Assn.*, 58 Cal. 356; 17 Ency. of Pl. & Pr. 872; *Swing v. Townsend*, 24 Ohio St. 1.)

It follows, therefore, that an order of the court below or of this court must be made in the premises before the appeal would operate as a supersedeas. (*Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. ed. 888.)

It is held in the latter case that the matter of supersedeas in this kind of cases is generally regulated by statute, or by rule of the court. We have no statute upon the subject. Whether there is a rule of court in the eighth judicial district, the record here does not show.

There is a statute at present in California providing that an appeal taken supersedes a receiver. (Sec. 1103, Cal. Code Civ. Proc.) Before this statute the law in California was similar to ours.

Before the amendment to the California code a writ of prohibition was held to be the proper method of bringing the matter of supersedeas in connection with a receiver before the supreme court. Since said amendment an appeal is the only

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remedy. (*Jacobs v. Superior Court*, 133 Cal. 364, 85 Am. St. 204, 65 Pac. 826.)

Prohibition is the proper remedy here, as an appeal would not be effective. (*Cronan v. Dist. Court*, 15 Ida. 205, 96 Pac. 768.)

SULLIVAN, C. J.—This is an application to this court for an order declaring that the judgment and order appealed from in the above-entitled case were superseded by the taking of an appeal, and giving a bond on appeal in the sum of \$300.

The action was brought by respondents as minority stockholders of the Kidd Island Lumber Co. to procure the appointment of a receiver for the appellant, the Kidd Island Lumber Co., upon the ground that its affairs are being mismanaged and to cancel a conveyance of a large amount of timber land from said Lumber Co. to the appellant, the Bradford-Kennedy Co., upon the ground that the sale was made without any consideration therefor and was fraudulent and void.

It appears from the record that summons was served on the Kidd Island Lumber Co., the Bradford-Kennedy Co. and J. N. Ashburn, on the 26th of March, 1910. The other defendants were not served and did not appear. It also appears that default was entered against the appellants, and findings of fact and conclusions of law and a decree granting all the relief prayed for were made and entered. Appellants thereafter, on the 18th of May, made a motion to vacate and set aside the default and judgment on certain specific grounds. The motion was heard and overruled and an order entered to that effect, from which order, as well as from the judgment, an appeal was taken. A cash bond of \$300 was given on said appeal. The judgment provided for the appointing of a receiver, canceling said conveyance and granting other relief. The judgment, among other things, provides as follows:

“And it is further ordered, adjudged and decreed that a receiver be appointed for the Kidd Island Lumber Co., a corporation, to take charge of all of its assets and property, real, personal and mixed, and to manage and control all of the

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assets and property, real, personal or mixed, of the Kidd Island Lumber Co., a corporation, under the direction of and until the further order of this court herein."

It appears from the transcript on the appeal that the property involved includes considerable real estate, over two million feet of lumber, sawmill, and much other personal property. The appellant on said appeal gave a cash bond for \$300, and now contends, under the provisions of sec. 4817 of the Rev. Codes of Idaho, that said judgment is superseded and all proceedings are stayed and that appellant is entitled to have possession of said sawmill plant, lumber and other property claimed to have been purchased by it from the said Kidd Island Lumber Co., to manage and control, pending the appeal. Said sec. 4817 is as follows:

"In cases not provided for in sections 4810, 4811, 4812 and 4813, the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in section 4809, stays proceedings in the court below, upon the judgment or the order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding, a public office, civil or military, within this state; and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action."

The court by its judgment found that the sale and transfer of said property by the Kidd Island Lumber Co. to the Bradford-Kennedy Co. was fraudulent and void, and now it is contended that the Bradford-Kennedy Co. is entitled to the possession of all of said property pending the appeal upon giving a bond of \$300. Application was made to the trial court for an order directing the receiver to relinquish possession of all of said property to the appellants, which application was denied. The trial court evidently concluded that it would endanger the interests of respondents to turn all of said property to the appellants pending the appeal,



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on the giving of a \$300 bond; that it was imperatively necessary to the preservation of said property in *statu quo*, and that the receiver's functions should not be suspended, especially so far as the preservation of said property pending the appeal was concerned.

Sec. 949 of the Code of Civil Procedure of California was substantially the same as said sec. 4817 of our Rev. Codes. In the *Matter of The Real Estate Associates*, 58 Cal. 356, where it was contended that all actions in or under insolvency proceedings were stayed by the appeal, and therefore the receiver had no right to prosecute any suit as such receiver, and that the giving of a \$300 appeal bond stayed all proceedings pending the appeal, the court decided against that contention, and held that the functions of the receiver were not suspended during the appeal. The legislature of California has since the date of said decision amended sec. 943, C. C. P., so as to provide for the suspension of an order appointing a receiver, pending an appeal, by giving a proper undertaking on appeal. However, we have no such provision in our statutes. We think the rule laid down in the above-cited case is applicable to the case here, and that the court did not err in holding that the giving of said \$300 bond did not suspend or supersede the appointment of a receiver. From the record in the case it clearly appears that it is necessary that the property should be preserved in *statu quo* as nearly as may be pending the appeal, in order to protect the interest of the parties.

In *Charles Waters v. Robert N. Dunn*, Judge, *ante*, p. 450, 110 Pac. 258, just decided by this court, in discussing the question whether the trial court had jurisdiction to suspend the operation of an injunctive judgment pending an appeal to the supreme court, it was said:

"We find no express authority in the statutes granting such jurisdiction; but where the rights of the parties ought in justice to be preserved in *statu quo* until the issue between them is finally determined on appeal, the court has the inherent power to and may in its sound discretion suspend the operation of an injunction during the appeal"; and in support

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Points Decided.

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of that proposition certain authorities are there cited. (See, also, 17 Ency. of Pl. & Pr., p. 872.)

We think that the court has the inherent power to preserve the property in litigation pending an appeal, and if necessity requires it, may place the same in the hands of a receiver for that purpose.

The trial court no doubt will see that the property is preserved by the receiver; therefore the motion of appellant in this court asking for an order declaring that the judgment and order appealed from was superseded by the taking of said appeal must be denied, and it is so ordered.

Costs in this court are awarded to the respondents.

Ailshie, J., concurs.

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(August 2, 1910.)

**WESTERN MOLINE PLOW COMPANY, Respondent, v.  
JOHN W. CALDWELL, Appellant.**

[110 Pac. 533.]

**ACTION TO RECOVER PROMISSORY NOTES—CONFLICT IN EVIDENCE.**

(Syllabus by the court.)

1. Where there is a substantial conflict in the evidence the findings of the trial court will not be set aside.

**APPEAL** from the District Court of the Fourth Judicial District, for Elmore County. Hon. Edward A. Walters, Judge.

Action to recover on promissory notes. Judgment for plaintiff. *Affirmed.*

J. G. Watts, for Appellant, cites no authorities on point decided.

E. M. Wolfe, for Respondent.

Under the rules of practice in this court, "where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed." (*Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80, and cases cited.)

SULLIVAN, C. J.—This action was brought to recover judgment on three certain promissory notes for protest and attorney's fees, amounting in all to \$1,978.28 and costs of suit.

The defendant by his answer admitted the execution of said notes but averred that the agent of the defendant had extended the time for payment thereof; also averred that before the commencement of this suit defendant had tendered to the attorney of the plaintiff the entire amount due on said promissory notes including protest fees, but that the attorney refused to accept said sum unless the defendant would pay \$150 attorney's fees.

Trial was had before the court without a jury and findings of fact were made in favor of the plaintiff and against the defendant. The court found that the amount of principal and interest due and unpaid on the promissory notes amounted to \$1,799.28, protest fees \$9.00 and attorney's fees \$170, and that the time for the payment of said promissory notes was not extended by the plaintiff, and that the notes were long past due on the date of the commencement of this suit. Judgment was entered on said findings for the plaintiff in the sum of \$1,978.28 and costs of suit. This appeal is from the judgment.

There is a substantial conflict in the evidence on the question as to whether there was an extension of the time for payment of said promissory notes, and under the well-established rule of this court, to the effect that where there is a substantial conflict of the evidence, the findings of the trial court will not be set aside (*Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80), the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Ailshie, J., concurs.

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Argument for Petitioner.

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(August 3, 1910.)

In re JACOB LOCKMAN, Habeas Corpus.

[110 Pac. 253.]

**INTOXICATING LIQUORS DEFINED—LOCAL OPTION STATUTE—NEAR BEER—  
MALT AND FERMENTED LIQUORS.**

(Syllabus by the court.)

1. Section 31 of the local option statute (1909 Sess. Laws, page 18) defines intoxicating liquors as including "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

2. Under the definition given by the legislature in sec. 31 of the local option statute, all "spirituous, vinous, malt and fermented liquors" are declared as a matter of law to be intoxicating, and it is unnecessary for the state to prove that any liquor or beverage falling within the enumerated class will in fact produce intoxication.

3. Under the provisions of the local option statute (sec. 31 thereof), it is necessary for the state to prove the intoxicating quality of all mixtures and preparations used or intended to be used as beverages which do not fall within the enumerated class designated as "spirituous, vinous, malt and fermented liquors."

4. The legislature in the enactment of the local option statute evidently had in mind a twofold object—first, that of discouraging, and as far as possible preventing, intoxication, and intemperance in the use of intoxicants; and secondly, and equally important, that of protecting the youth of the state from acquiring a taste for intoxicants and the habit of indulging in drinks and beverages that contain the intoxicating element.

Original application for writ of *habeas corpus*. Writ issued and hearing had on return thereto. Petitioner remanded to the custody of the officer and proceeding dismissed.

Hawley, Puckett & Hawley, for Petitioner.

We do not believe that the statute interpreted by the usual rules by which a well-educated man would interpret any writing can be called ambiguous, for we cannot conceive of any

## Argument for Petitioner.

construction being correct which would limit the phrase "used as a beverage and produce intoxication," to the preceding words describing mixed drinks. If this statute is ambiguous, then we insist that the rule set forth in 26 Ency. of Law, at page 646 et seq., should be adopted.

"Statutes, in their nature penal, should not be extended by construction beyond their natural meaning." (*Ind. School Dist. v. Collins*, 15 Ida. 535, 128 Am. St. 76, 98 Pac. 857.)

There is one state in which the statutory provisions have sufficient analogy to the statutory provisions of our local option law for its decisions to be of guiding importance here. In the case of *Ex parte Gray* (Tex. Cr. App.), 83 S. W. 828, the court said: "If the liquor sold in the local option territory is not of an intoxicating quality, . . . that is, if it is not such as to produce intoxication when taken in the stomach in such quantities as may practically be drunk, . . . then it is not an offense to sell the same in local option territory." (See, also, *James v. State*, 49 Tex. Cr. 334, 91 S. W. 227.)

The defendant contends that the state is under the necessity of proving that "near beer" is an intoxicating liquor. At least the question of its intoxicating qualities would be referred to the triers of fact and would become solely a question for the jury. (*Potts v. State*, 50 Tex. Cr. 368, 123 Am. St. 847, 97 S. W. 477, 7 L. R. A., N. S., 194; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911; *Rau v. People*, 63 N. Y. 277; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193; *State v. Muncey*, 28 W. Va. 494; *Wall v. State*, 78 Ala. 417; *State v. Starr*, 67 Me. 242.)

Whether beer, which is not ale, porter or strong beer, is intoxicating is a question for the jury. (*Commonwealth v. Bloss*, 116 Mass. 56; *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. 1, 26 L. R. A. 138; *Blatz v. Rorhrback*, 116 N. Y. 450, 22 N. E. 1049; cases cited on p. 120, 13 Am. & Eng. Ann. Cases.)

Our local option law never intended that the sale of any beverage should be prohibited in prohibition territories, unless that beverage is capable of producing intoxication.

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Argument for State.

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D. C. McDougall, Attorney General, O. M. Van Duyn, J. H. Peterson, and F. A. Hagelin, for the State.

Under the class of statutes which declare that a certain class or certain classes of liquor, such as spirituous, vinous, malt, and fermented liquors, shall be deemed intoxicating, the question usually arises whether it is necessary to allege and prove that the particular liquor sold is in fact a spirituous, vinous, malt, or fermented liquor, and therefore intoxicating. See in this connection, as to proof in general, *Hewitt v. People*, 186 Ill. 336, 57 N. E. 1077, *affirming* 87 Ill. App. 367. Under such a statute it has been held that it is not necessary to allege that beer is a malt liquor. (*Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664.) And, as the courts will take judicial notice that beer is a malt liquor, it is not necessary to introduce proof to that effect. (*Mullen v. State*, 96 Ind. 304; *Stout v. State*, 96 Ind. 407; *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238; *Myers v. State*, 93 Ind. 251 (*overruling Weis v. State*, 33 Ind. 204); *Klare v. State*, 43 Ind. 483; *Shaw v. State*, 56 Ind. 188; *Plunkett v. State*, 69 Ind. 68; and *Kurz v. State*, 79 Ind. 488.)

Where a statute expressly prohibits the sale of liquors, it is not necessary to allege in an indictment thereunder that the particular liquor or class of liquors, the sale of which is forbidden, is intoxicating. (*Farris v. Commonwealth*, 111 Ky. 236, 63 S. W. 615; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *State v. Evans*, 89 Minn. 506, 95 N. W. 1133; *State v. Thornton*, 63 N. H. 114; *State v. Jenkins*, 64 N. H. 375, 10 Atl. 699; *People v. Cox*, 106 App. Div. (N. Y.) 299, 94 N. Y. Supp. 526.)

Nor is it necessary upon the trial of such a prosecution to prove that the particular liquor or class of liquors is intoxicating. (*Bond v. State*, 56 Ark. 444, 19 S. W. 1062; *Bradshaw v. State*, 76 Ark. 562, 89 S. W. 1051; *Eaves v. State*, 113 Ga. 749, 39 S. E. 318; *Kettering v. Jacksonville*, 50 Ill. 39; *State v. O'Connell*, 99 Me. 61, 58 Atl. 59; *Reyfelt v. State*, 73 Miss. 415, 18 So. 925; *Schwaf v. People*, 4 Hun (N. Y.), 520; *State v. Piner*, 141 N. C. 760, 53 S. E. 305; *Hatfield v.*

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*Commonwealth*, 120 Pa. 395, 14 Atl. 151; *State v. Rush*, 13 R. I. 198; *State v. Morehead*, 22 R. I. 272, 47 Atl. 545; *State v. Gravelin*, 16 R. I. 272, 16 Atl. 914; *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844.)

Sec. 31 of the local option law defines "malt liquor and mixtures thereof" as an intoxicating liquor. Further, the very fact that spirituous, malt and vinous liquors are particularly mentioned in the statute indicates that the legislature had in mind that they were intoxicating.

The last three words of sec. 31 are intended as adjectives only for the first subject immediately before it, to wit, "other drinks." The legislature named all liquors that it could possibly think of that were intoxicating, and then further to fortify the law which they were passing they put on the last clause referring to other drinks which could be shown to be intoxicating. The punctuation is such that we have no right to assume that the last three words of said section apply to any other subject than the one immediately preceding it.

· AILSHIE, J.—The petitioner, Jacob Lockman, was arrested and taken before the probate court in Canyon county, charged with selling intoxicating liquor in a prohibition district contrary to the local option statute. A preliminary examination was held, and the evidence taken has been made a part of the petition in this case. The petitioner insists that the complaint and depositions fail to show that he has committed any public offense, and that he is therefore held unlawfully and is entitled to his discharge. The undisputed evidence as developed at the preliminary examination shows that the petitioner sold to one Charles S. Paynter at the city of Nampa four quart bottles of malt liquor, commonly known as "near beer." It is admitted that Canyon county is a prohibition district within the meaning of the local option statute. (1909 Sess. Laws, pp. 9 to 19.) It is also admitted that this liquor, called "near beer," is a malt liquor. A chemist who analyzed the near beer purchased from petitioner testified that he found it contained 1.28% alcohol, and 7.1% malt extract. He also testified that this beer did not contain enough alcohol to in-

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toxicate anyone unless it would be in rare instances. He says that a person could not drink enough of it to secure sufficient alcohol to intoxicate him.

It was practically conceded on the argument that this drink, designated near beer, is classed among the "soft" drinks or "temperance" beverages and is not ordinarily used as an intoxicant.

The only question to be determined in this case is whether or not the liquor or beverage called near beer falls within the purview of the local option statute as the words "intoxicating liquors" are defined in sec. 31 thereof.

That section reads as follows:

"Sec. 31. The words 'intoxicating liquors' as used in this Act shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

The petitioner contends that the words, "that may be used as a beverage and produce intoxication," refer to and modify "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks." In other words, the petitioner insists that the property or quality of producing intoxication is the test that must be applied in every case whether the liquor be vinous, malt, fermented, or a mixture or preparation thereof or any other drink. On the other hand, the state contends that the law-makers have unqualifiedly and arbitrarily defined "spirituous, vinous, malt and fermented liquors" as intoxicating as a matter of law, whether they be intoxicating as a matter of fact or not. The state also contends that "all mixtures and preparations thereof, including bitters and other drinks," are to be tested by the proofs as to whether they will in fact produce intoxication. This case must be settled and determined upon the acceptance and application of one of these two views of the statute and theories of construction.

In support of the position taken by the defendant, he calls our attention to the following among other authorities: *Campbell v. City of Thomasville*, 6 Ga. App. 212, 64 S. E. 815;



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*Stoner v. State*, 5 Ga. App. 716, 63 S. E. 602; *Ex parte Gray* (Tex. Cr.), 83 S. W. 828; *James v. State*, 49 Tex. Cr. 334, 91 S. W. 227; *Potts v. State*, 50 Tex. Cr. 368, 123 Am. St. 847, 97 S. W. 477, 7 L. R. A., N. S., 194. An examination of these cases discloses the fact that the Texas and Georgia courts construe somewhat similar statutes in harmony with the view maintained by the petitioner, and take the position that the statutes of those states were intended to prevent intemperance and intoxication, and that the test as to whether the liquor comes within the purview of those statutes is to be determined upon the intoxicating property or quality of the liquor or drink.

The state, on the other hand, calls our attention to a great array of authorities which seem to support its contention. Among the many cases cited, the following seem to be closely in point here: *Sawyer v. Botti* (Iowa), 124 N. W. 787; *Luther v. State*, 85 Neb. 674, 120 N. W. 125; *State v. Frederickson*, 101 Me. 37, 115 Am. St. 295, 63 Atl. 535, 6 L. R. A., N. S., 186, 8 Ann. Cas. 48; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *State v. Piche*, 98 Me. 348, 56 Atl. 1052.

In *Sawyer v. Botti*, the supreme court of Iowa as recently as February of this year had occasion to consider a statute somewhat similar to ours, and Mr. Justice McClaim speaking for the court said:

“The statute (Code, sec. 2382) prohibits the selling or keeping for sale, etc., of ‘any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever,’ except as otherwise provided. It is apparent, therefore, that the prohibition is twofold: First, of the sale of any liquor which is in fact intoxicating; second, of certain described liquors, whether intoxicating or not. In the second class are enumerated beer and malt liquor, and if the beverage in question is beer or malt liquor, then the fact that it is so manufactured as not to be intoxicating in its ordinary use as a beverage is immaterial. . . .

“The manufacturer cannot bring a malt liquor within the class of liquors not prohibited by the statute by giving it some

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name other than that of beer, much less can he do so by adding a qualifying descriptive term to the word 'beer' used in the name.

"We reach the conclusion without the slightest doubt that the beverage in question, being a liquor manufactured from malted grain by a process involving fermentation, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited."

In *Luther v. State*, the supreme court of Nebraska had under consideration a statute which provides that "all persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks," without first having complied with the provisions of the act and obtained a license, should be deemed guilty of a misdemeanor, etc. In course of the consideration of that statute, the court said:

"It is contended by counsel for plaintiff in error that it was the legislative intent to suppress the sale of intoxicating liquors, and that, although the term 'malt liquors' is used in the act, yet it was not the purpose to prevent the sale of malt liquors or liquids, unless they contained a sufficient quantity of alcohol to produce intoxication; or, stated differently, that the language used in secs. 11 and 20 must be construed to mean as if it read 'intoxicating malt liquor.' I cannot read the statute in that light. As well might we apply the adjective to the words 'spirituous' and 'vinous.' It is my opinion that the legislature realized and appreciated the fact that malt, spirituous, and vinous liquors are equally largely used as a beverage and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken and at the same time creating an abnormal appetite which leads to dissipation and inebriety. At any rate the law prohibits the sale of 'malt liquors' without a license, and we must obey its plain mandate."

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We quote the foregoing extracts to show what other courts have said of legislation similar to our own statute.

It will thus be seen that courts of distinction and high standing and of states widely separated have taken contrary views of similar statutes. We shall therefore endeavor to ascertain from an independent examination what the legislature intended by the enactment of the statute under consideration, and in doing so our first consideration should be given to the natural, ordinary and simple meaning and import of the language employed. The state contends that the words "that may be used as a beverage and produce intoxication" apply to and modify only the clause in which they are found and refer to the mixtures and preparations named therein. This construction is in harmony with our understanding of the language used. On the other hand, if we should adopt the view taken by the defendant we would have to hold that each kind or class enumerated commencing with the word "spirituous" is modified by the phrase "that may be used as a beverage and produce intoxication." The section written out in full, as defendant contends that it was intended, would read as follows:

"Sec. 31. The words 'intoxicating liquors' as used in this Act shall be deemed and construed to include spirituous liquors that may be used as a beverage and produce intoxication, vinous liquors that may be used as a beverage and produce intoxication, malt liquors that may be used as a beverage and produce intoxication, and fermented liquors that may be used as a beverage and produce intoxication, and all mixtures and preparations thereof, including bitters and other drinks, that may be used as a beverage and produce intoxication."

We cannot agree with this contention. It is not to be presumed that the legislature would have entered into an enumeration of certain drinks commonly known and understood to contain the element of alcohol and to be intoxicating if they had in fact intended that the test in all cases should be whether or not the drink is such as will produce intoxication. There would have been no reason for or object in enumerating these various liquors, distilled, vinous, malt, and

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fermented, if the legislature had intended that in all cases the test should be whether or not the drink is in fact such as will produce intoxication. The legislature in the enactment of this law evidently had in mind a twofold object: First, that of discouraging and as far as possible preventing intoxication, and intemperance in the use of intoxicants; second, and equally important, that of protecting and preventing the boys and young men of the state from acquiring a taste for intoxicants and the habit of indulging in drinks and beverages that contain the intoxicating element. The legislature likewise recognized the fact that vinous, malt and fermented liquors all contain, to some extent, the element of alcohol, although it may not be to such a degree as will produce intoxication. They therefore concluded when writing this statute defining the words "intoxicating liquors" to declare as a matter of law that all "spirituous, vinous, malt and fermented liquors" are intoxicating, irrespective of the amount of alcohol they may contain and whether or not the particular kind of drink will in fact produce intoxication. They must also have had in mind the difficulty that would arise in the enforcement of such a law as they were enacting if they left it to be proven in every case of the sale of a vinous, malt or fermented liquor, whether or not the same was in fact such as would produce intoxication. If it were a question of fact in each case, one man might be convicted for the sale of a certain brand of malt or fermented liquor, while another man might be acquitted for the sale of the identical brand of liquor. Under that view of the statute near beer might be sold in one prohibition district with safety and in another the sale prove to be a violation of the statute. This is a drink that furnishes great opportunities for violation of the statute. It was said by the supreme court of North Carolina, who evidently spoke from the record, in *State v. Dannenberg* (N. C.), 66 S. E. 301, that: "Although near beer properly made is a nonintoxicating beverage, the sale of it furnishes extraordinary opportunities for the violation of the state prohibition law; that it is made by those who make beer, sold by those who sell beer, and drunk by those who

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drink beer; and that 'it looks like beer, smells like beer, and tastes like beer.' "

In our judgment it was the clear and unmistakable intent of the legislature to say, as they had an undoubted right to say (*State v. Frederickson*, 101 Me. 37, 115 Am. St. 295, 6 L. R. A., N. S., 186, 63 Atl. 535, 8 Ann. Cas. 48; Woollen and Thornton on Intoxicating Liquors, secs. 5 and 114) that all "spirituous, vinous, malt and fermented liquors" should be treated as intoxicating within the meaning of this statute. The lawmakers also appreciated the fact that there would be many other mixtures and preparations used as a beverage that would produce intoxication and which the law-making power could not specifically enumerate, and so they concluded that with reference to this latter class of drinks and beverages they would fix the test as *one of fact in each case as to whether the drink or beverage would produce intoxication*. We conclude, therefore, that section 31 of the local option law defining "intoxicating liquors" contains two divisions or classes of liquors or beverages: First, "spirituous, vinous, malt and fermented liquors" which are declared as a matter of law to be intoxicating, and for which no proof is required except to show that they come within the enumeration; and second, all other mixtures and preparations thereof which will in fact produce intoxication. In the latter case the state must prove that the liquor is such that it may be used as a beverage and produce intoxication.

It is conceded that "near beer" is a malt liquor. It follows, therefore, from what has been said that it falls within the definition of sec. 31 of the local option statute, and is declared as a matter of law to be an intoxicating liquor, and cannot be sold in a prohibition district.

We conclude that the petitioner is properly held under process issued from a court of competent criminal jurisdiction. Petitioner is remanded to the custody of the sheriff of Canyon county. Proceeding dismissed.

Sullivan, C. J., concurs.

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Points Decided.

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(August 5, 1910.)

In re G. W. HULL, Habeas Corpus.

[110 Pac. 256.]

## SUNDAY REST LAW—PUBLIC AMUSEMENTS—SCENIC RAILWAY.

(Syllabus by the court.)

1. Section 6825 of the Rev. Codes provides that "It shall be unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance-house, racetrack, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling-alley, variety hall, or any such place of public amusement. . . ."

2. *Held*, that in order to bring a public amusement not specifically enumerated by the statute (sec. 6825, Rev. Codes), under the general language of "any such place of public amusement," the likeness or similarity must exist in something other than the mere fact that it is a "public amusement," and must in a general way correspond to the amusements specified.

3. What is designated as a "scenic railway," being a railway constructed of rails and on which cars are run for the purposes only of amusement, where the track is elevated a considerable distance above the ground at the place of beginning and is built on an incline with intervening elevations, and the cars are propelled by the force of gravity, is not "such place of public amusement" as a "merry-go-round," and is not prohibited from being kept open on Sunday by the provisions of sec. 6825 of the Rev. Codes.

4. An amusement that is not *per se* unlawful or criminal and is not in itself immoral or dangerous or detrimental to the public health will not be included within the provisions of the statute prohibiting certain specified public amusements and other like and similar amusements on Sunday, unless the same is forbidden by the statute either in direct terms or by clear implication.

Original action in this court for writ of *habeas corpus*. Petitioner was convicted in the justice's court of Boise precinct, Ada county, of a violation of the Sunday rest law in unlawfully keeping open a place of public amusement, to wit, a scenic railway, on Sunday. Hearing had on return to writ. Prisoner discharged.

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Argument for Defendant.

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Richards & Haga, and P. E. Cavaney, for Petitioner.

The defendant's contention is that he has not violated sec. 6825, Rev. Codes, commonly known as the Sunday rest law, for the reason that the wording of the law plainly and clearly shows that there is nothing in said law whatsoever that refers to such a place of public amusement as the said scenic railway, and that the keeping open of said amusement does not come within the inhibition of the said Sunday rest law. Penal statutes should be strictly construed. (2 Lewis' Sutherland, Stat. Const., sec. 501; *Ex parte Bailey*, 39 Fla. 734, 23 So. 552; *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294.)

"The doctrine of '*ejusdem generis*' is applied in all cases where there is doubt as to the intention of the legislature, and, as a rule, statutory construction is stated to be that where general words follow particular ones in a statute, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified." (*State v. Prather*, 79 Kan. 513, 131 Am. St. 339, 100 Pac. 57, 21 L. R. A., N. S., 23; *Ex parte Neet*, 157 Mo. 527, 80 Am. St. 638, 57 S. W. 1025; *Commonwealth v. Burrell*, 7 Pa. 34; *People v. Hochstim*, 36 Misc. Rep. 562, 73 N. Y. Supp. 626, 634; *In re Hastings & Ward* (Pa.), 15 Phila. 420.)

"Confining our consideration to the question of prohibited shows, it is evident that the legislature aimed at preventing those shows which in its opinion disturbed the repose of the community." (*Keith and Proctor Amusement Co. v. Bingham*, 108 N. Y. Supp. 205; *United States v. Buffalo Park*, 16 Blatchf, 189, Fed. Cas. No. 14,681; *St. Louis Agri. & Mech. Assn. v. Delano*, 108 Mo. 217, 18 S. W. 1101.)

D. C. McDougall, Attorney General, J. H. Peterson, and C. P. McCarthy, for Defendant.

It is impossible to name specifically in an act all existing forms of public amusement, and it is impossible to name specifically all variations and modifications of existing amusements and similar amusements which may be invented in the future. It is therefore clear that the legislature in dealing

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Opinion of the Court—Ailshie, J.

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with either business or amusement must use general language designating a general class or genus.

Conceding that the general rule of *ejusdem generis* is here applicable, a scenic railway, such as described, is wholly within the letter and intent of the statute. Among those things specifically enumerated are racetracks, merry-go-rounds and bowling-alleys. These devices are closely analogous and of the same genus and general nature of the things enumerated. (*State v. Groves*, 119 N. C. 822, 25 S. E. 819; *Randolph v. State*, 9 Tex. 521; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.)

The classification in this statute is very broad, varying from the comparatively quiet performance of theaters to the noisy and boisterous amusements of racetracks and merry-go-rounds. If the general words refer to the genus or class, the genus in this case must be admitted to be very broad, and where the classification is so broad as to be bordered on the one side by theaters and on the other by racetracks and merry-go-rounds, can it be seriously denied that a scenic railway is included? Though the device were not of the same general class and genus, "This rule [*ejusdem generis*] can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intentions or confining the operation of the statute within narrower limits than were intended by the lawmaker." (2 Lewis' Sutherland, Stat. Const., sec. 437, and cases there cited; *Willis v. Mabon*, 48 Minn. 140. 31 Am. St. 626, 50 N. W. 1110, 16 L. R. A. 281; *State v. Holman*, 3 McCord (S. C.), 306; *Webber v. Chicago*, 148 Ill. 313, 36 N. E. 70.)

AILSHIE, J.—The petitioner was convicted in the justice's court of Boise precinct, Ada county, of violating sec. 6825 of the Rev. Codes, known as the "Sunday rest law," and was sentenced to pay a fine of \$50 and to be imprisoned in the county jail for a term of ten days. The specific offense charged against the petitioner was that of unlawfully keeping open a place of public amusement known and designated as a "scenic railway."



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Opinion of the Court—Ailshie, J.

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This case was submitted on a stipulation of facts, from which it appears that on July the 24th, the same being Sunday, the petitioner kept open his place of amusement and admitted such persons as applied for admission, and operated his cars and furnished rides to those who paid the fee of ten cents. It seems that the Natatorium Park Amusement Company, Ltd., is a corporation organized under the laws of this state, and that the petitioner, G. W. Hull, is its general manager, and has control and management of its property. This so-called scenic railway consists of a track several hundred feet long on which wooden cars are run at a high rate of speed. The cars are elevated by means of a cog-wheel attachment, so that the track is a considerable distance from the ground at the highest place. It is built on a general incline, with slight elevations intervening from that point to the end of the track, where it comes to the surface of the ground near the place of starting. These cars run from the highest point by force of gravity, and are operated purely as a matter of amusement to those who take the rides and incidentally for the pecuniary benefit of the proprietors of the park. Ten cents' worth of amusement via this scenic railway lasts about two minutes, so the record says. The tourist may then purchase a new ticket or forego a further view of the scenery.

The state contends that this comes within the provisions and purview of sec. 6825 of the Rev. Codes. That statute provides among other things as follows: "It shall be unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance-house, race-track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling-alley, variety hall, or any such place of public amusement. . . ."

It is conceded that this does not come within the list of *enumerated* amusements. But the state insists that it is analogous and similar to a "merry-go-round," and is consequently prohibited by the phrase "or any such place of public amusement." It is argued on behalf of the state that under the doctrine of *ejusdem generis* a scenic railway such as above

## Opinion of the Court—Ailshie, J.

described is prohibited on the ground that it falls within the prohibition of *like, similar and kindred amusements* to the ones specifically prohibited. The petitioner on the other hand argues equally as earnestly and eloquently that under the doctrine of the same rule the amusement he is conducting is not included within the prohibition of the statute.

We enter upon the consideration of this statute fully conscious of the duty which rests on the court to ascertain what the law is on the subject, and to declare it as we find it rather than as we think it ought to have been. We have no right to add to or take from the law. The task is sometimes extremely difficult to ascertain the purpose or intent of the law-makers, but that difficulty does not relieve a court of the undertaking.

It is useless to undertake to review or analyze the authorities cited by counsel in this case, for the reason that none of them construe a statute in the language of ours, and the only benefit we derive from them is such as we have gathered from the analogy of reasoning employed. The following are the principal cases to which our attention has been called and that we have given examination: Cited by petitioner: *Ex parte Neet*, 157 Mo. 527, 80 Am. St. 638, 57 S. W. 1025; *Keith & Proctor Amusement Co. v. Bingham*, 108 N. Y. Supp. 205; *State v. Prather*, 79 Kan. 513, 131 Am. St. 339, 100 Pac. 57, 21 L. R. A., N. S., 23.

By the state: *State v. Groves*, 119 N. C. 822, 25 S. E. 819; *Randolph v. State*, 9 Tex. 521; *Chicago Union Trac. Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. 626, 50 N. W. 1110, 16 L. R. A. 281; 2 Lewis' Sutherland on Stat. Const., sec. 437; *State v. Dolan*, 13 Ida. 693, 92 Pac. 995, 14 L. R. A., N. S., 1259.

It is difficult to tell the exact theory on which the law-makers drafted this section of our statute. The amusements enumerated and prohibited are not similar or kindred amusements. There is apparently nothing common to all of them except that they are all *public amusements*. They are not all immoral amusements nor are they all noisy and boisterous

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amusements. The racetrack may be said to be immoral in that it is a place of betting and gambling, and so it may be said that the "concert saloon" and the "variety hall" are classes of amusement at least suggestive of immorality. On the other hand, the merry-go-round is not an immoral amusement. It may also be said that there is nothing especially immoral about the circus or show, the billiard hall nor the bowling-alley, and yet these are prohibited on Sunday.

When we come, therefore, to ascertain the moving purpose of the lawmakers in enumerating the amusements that should be prohibited, we fail to find a reason that is common to all of the amusements enumerated or that could be applied to each of them. It is patent that the legislature did not intend to absolutely forbid and prohibit *all* public amusements on Sunday. If they had so intended they would undoubtedly have said so in so many words. On the contrary, they immediately follow the specific amusements enumerated with the words "*or any such place of public amusement.*" The word "such" has a very definite and distinct meaning. It is defined by the lexicographers as: "Of that kind; of the same or like kind; identical with or similar to something specified or implied; . . . being the same as what has been mentioned or indicated; being the same in quality; having the quality specified, etc."

Now, it is evident that the legislature intended to prohibit any other public amusement not enumerated which could be distinctly classed as *like* or *similar* to those specified, but since all are alike in that they are *public amusements*, the similarity must exist in something else other than the mere fact of amusement. The merry-go-round needs no description, for, on account of its popularity, it must be known and understood by all. There is a similarity between the merry-go-round and this scenic railway in that each furnishes a ride, but the character of the ride is apparently very different on the scenic railway from that of the merry-go-round. One of the distinguishing features of the merry-go-round is the inspiring and animating sacred and patriotic music which it furnishes and which tends to make it more public than it

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otherwise might be. This the scenic railway does not seem to have. The scenic railway is by force of necessity obliged to make up in scenery for the loss of horses, giraffes, zebras, elephants and other beasts of burden that add interest and variety to the merry-go-round. Riders of animals of the same species are enabled to quietly converse together while they enjoy the music, but on the scenic railway there is nothing to be done but to hold on, exercise the muscles, and view the scenery.

The merry-go-round was evidently prohibited on account of the noise it makes and the fact that it is usually located in the midst of the residence portion of the city, town or village. So far as the record shows, this scenic railway is not attended by the noise that characterizes the merry-go-round. Again, the character of the amusement under consideration is such as to render it necessary that it have a great deal more room than the merry-go-round requires, and as a consequence it must be located outside of the principal residence portion of the community, and will therefore be farther removed from residences generally and from places of public worship.

This class of legislation is upheld solely as an exercise of the police power of the state. The prohibition of public amusements on Sunday must therefore rest on the theory that it is necessary either for the protection of the public morals, the public health or the public peace and safety. (*Mullen & Co. v. Moseley*, 13 Ida. 457, 121 Am. St. 277, 90 Pac. 986, 12 L. R. A., N. S., 394, 13 Ann. Cas. 450; *State v. Dolan*, 13 Ida. 693, 92 Pac. 995, 14 L. R. A., N. S., 1259.)

This amusement is not *per se* unlawful or criminal, nor is it immoral or dangerous or detrimental to the public health. It is apparently a wholesome, innocent outdoor amusement. In order to prohibit such an amusement we ought to find the prohibition within the statute either in positive terms or by clear implication. No such means of amusement existed in this state at the time of the passage of this act, and if this is to be prohibited under the statute, it must be by reason

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of it being "such a place of amusement" as some one of those specifically enumerated. We do not feel that we would be justified in extending the statute to cover this means of amusement and thereby make its maintenance and operation a crime. If we should do so it would only be a short step to include the automobile or street-car that is operated on Sunday for the accommodation of those who desire a pleasure ride. If the legislature should see fit to close such places of amusement as this on Sunday, it may do so, but until that time we think no serious harm can be done to the morals or health of the people by permitting an amusement like the one in question to keep open on Sunday. The chief objection to most of the public amusements and resorts is not to the amusement feature itself, but to the habit of the proprietors of such places adding to them immoral, corrupting or boisterous features or attendants until the public conscience rebels against them and demands a total cessation. That will be the result with this amusement if it is not run orderly and decently.

We conclude that a "scenic railway" such as that described in the record in this case does not come within the prohibition of the statute. The petitioner should be discharged, and it is so ordered.

Sullivan, C. J., concurs.

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Points Decided.

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(August 11, 1910.)

GARDNER G. ADAMS, Plaintiff, v. ROBERT LANSDON,  
as Secretary of State of the State of Idaho, Defendant.

[110 Pac. 280.]

PRIMARY ELECTION LAW—CONSTITUTIONALITY OF—LEGISLATIVE INTENT  
—MANDATORY PROVISIONS—STATUTORY CONSTRUCTION—EXPENDI-  
TURES OF CANDIDATES—PROVISIONS OF LAW CONSTRUED TOGETHER—  
WHEN A PERSON IS A CANDIDATE—PRECINCT OFFICERS.

(Syllabus by the court.)

1. That provision of section 14 of an act entitled, "An act relating to and providing for the nomination of candidates of political parties," etc., and commonly known as the primary election law (Sess. Laws 1909, p. 196), which requires a voter to vote for both first and second choice if there are more than twice as many candidates as there are positions or offices to be filled, is not in conflict with sec. 19, art. 1, of the constitution, which provides that "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage."

2. Sec. 19, art. 1, of the constitution has reference to the attendance of officers, civil or military, at the polls, and prohibits them from interfering with the free and lawful exercise of the right of suffrage.

3. By the provisions of said act, the legislative intent was to take the nomination of the officers therein named away from party committees or party conventions and have them nominated by the legal voters of the several political parties by a majority of the first-choice votes if possible, and in case no candidate receives a majority of first-choice votes, then by a plurality of first and second-choice votes added together.

4. That provision of sec. 14 of said act which reads as follows: "Vote for both first and second choice if there are more than twice as many candidates as there are positions," is mandatory.

5. The failure to vote for both a first and second choice will not avoid the ballot except as to the particular office where both a first and second choice vote is required and for which the voter has failed to express both a first and second choice.

6. The provisions of the primary election law in regard to personal expenditures of candidates to aid or promote their nomination are not repugnant to the provisions of sec. 9, art. 1, constitution of Idaho, which declares that "Every person may freely speak, write

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Points Decided.

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and publish on all subjects, being responsible for the abuse of that liberty."

7. The intent and purpose of said primary election law is to prevent large expenditures of money, property or promises to aid or promote the nomination of any person.

8. Under the provisions of sec. 24 of said law, a candidate for nomination is prohibited from expending for "personal expenses" as the same is defined by said section, "or at all," to aid or promote his nomination, more than fifteen per cent of the yearly compensation or salary attached to the office which he seeks.

9. All of the provisions of said act in regard to the nomination of a candidate by payment of a fee or by petition and also the provisions in regard to personal expenses must be construed together, and the candidate is prohibited from expending for all such purposes more than fifteen per cent of the yearly salary of the office he is seeking.

10. A person is a candidate for nomination within the intent of the primary election law when he is expending his money in employing and sending out workers or perfecting an organization, or advertising and exploiting himself, or influencing public opinion in his favor or against an opponent, or in numerous other ways that present themselves to the office-seeker for the purpose of increasing and enhancing his ultimate chances of nomination for a given office or to aid or promote such nomination.

11. Under the direct primary law the *purpose* of the expenditure by a candidate is the test of its lawfulness without reference to the time at which it was made.

12. Precinct officers may, under the provisions of sec. 29 of said act, be nominated in any reasonable way provided by a party committee or organization.

13. Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.

This is an original proceeding for a writ of prohibition to restrain the secretary of state from certifying to the several county auditors of the state a list containing the names, post-office address and party designation, etc., of candidates as required by the primary election law. Peremptory writ *denied* and proceeding dismissed.

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Argument for Defendant.

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Hawley, Puckett & Hawley, Karl Paine, and Good & Adams, for Petitioner.

The provision in sec. 14 of the act, "Vote for both first and second choice if there are more than twice as many candidates as there are positions," is ambiguous and uncertain. If it was intended to be a mandatory provision compelling the voter to vote for first and second choice as to candidates for a particular office, then it is unconstitutional, in that it violates the provisions of sec. 15, art. 1 of the constitution.

This constitutional provision applies to primary as well as general elections. A statute may be within the inhibitions of the constitution as well by implication as by expression. (*Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 271.) This statute by implication interferes with the free exercise of the right of suffrage.

*State v. Nichols*, 50 Wash. 508, 97 Pac. 728, is the only case of which we have knowledge that passes upon a similar question, but we hold that it is not in point so far as our contention here is concerned. The legislature of our state in passing our primary election law followed the law of the state of Washington closely, but eliminated the mandatory provisions with reference to first and second choice. If it had been the intention of the legislature to compel the elector to vote for both first and second choice, why was it the Washington law was not followed in this regard? Does not such provision in the Washington law so eliminated from the Idaho law of itself and in itself prove that it was the intention of the legislature to leave it optional with the voter whether he cast his ballot for first choice only, or for both first and second choice?

D. C. McDougall, Attorney General, J. H. Peterson, and O. M. Van Duyn, for Defendant.

While there is no express statutory demand in the law, requiring the voter to vote for a second choice, and providing that if he does not the ballot shall not be counted, yet there



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Argument for Defendant.

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is by clear and strong implication an intent of the legislature revealed that it is the duty of the voter to vote both a first and second choice. We find this intent revealed by that part of section 14 which provides for the form of ballot and instructions thereon, and by an absolute lack of any provision whatsoever in the primary law providing for the making of any nomination, either by convention or by another primary election, should the first primary election by any means at all fail to result in a nomination.

The preferential system arose from a desire on the part of the legislature to avoid the expense and inconvenience of two elections. Therefore, it was sought to bring about this result by requiring the people to decide between a first and second choice, providing that if a majority of the first choice votes were not had, that a plurality of first and second choice would prevail. The legislature must have had two objects—first, putting into the hands of the greatest number of people the nominations of the officers; second, to prevent another election being had by requiring first and second choices to be made. In construing the law, then, we must construe it in the light of the evident purpose that the legislature had in view. The intent of a statute is the law. (2 Sutherland on Stat. Const., 2d ed., secs. 363, 366, 368–370.)

“The provision of the statute governing the conduct of elections is mandatory, when the purpose of the law-making power will be plainly defeated if its command to do acts in a particular way did not imply a prohibition to do them in any other way.” (*Perry v. Hackey*, 11 N. D. 148, 90 N. W. 483; 7 Dec. Dig., sec. 227.)

When the disregard of a statutory provision would work the ruin of a law, the provision must be regarded as mandatory and followed. It is reasonable to believe that a disregard of said mandatory provision of preferential voting would necessarily result in a rejection of the ballot so voted. (Beal on Rules of L. Int., pp. 331, 434; 26 Am. & Eng. Ency. of Law, 613.)

We think the intent of the law is plain that the expenses shall be calculated from the time of filing of the acceptance

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Argument by *Amicus Curiae*.

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of the nomination. (*State v. Bates*, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105.) This case is in point, as it is based upon a statute almost identically the same as the Idaho statute. To hold otherwise than is laid down in the rule of *State v. Bates* would bring about a great uncertainty and would be productive of ill-results, and following the said case would make our statute most uncertain, indefinite and ambiguous and most difficult of enforcement.

O. E. McCutcheon, *amicus curiae*.

Our law is different from the Washington law in using mandatory words addressed directly to the voter in the second person, and this tends to add strength to its commands. (*State v. Connor*, 86 Tex. 133, 23 S. W. 1103, at 1107; 3 Words and Phrases, 2079.)

The command is, "Vote for both a first and second choice." Is there any doubt or room for construction here? Let us look at the other commands of the law. The first is, "Mark only your party ticket." Again it is commanded, "Do not vote for the same person for both first and second choice."

It is true that election laws are liberally construed in favor of the voter, so that his vote may be saved if possible, and that doctrine should apply to the primary law. But liberal construction is for the benefit of the willing and obedient; the voter who honestly tries to obey the law, but does so imperfectly; not for the unwilling and disobedient; the voter who, knowing the law, undertakes to defy it.

The vague suggestion that it somehow infringes upon the right of voters to free suffrage under sec. 19 of our Bill of Rights is altogether visionary. The same argument, in substance, has been made against every legislative act in the history of suffrage regulation, commencing with registration laws, back at least in the '50's and from thence on down through the category. This sec. 19, uses the words "interfere" and "prevent" and evidently refers to officers, civil or military, being about the polls to meddle with or intimidate electors. But however that may be, our constitution, unlike that, I think, of any other state, expressly confers upon the

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Opinion of the Court—Sullivan, C. J.

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legislature power to enact laws on the subject under consideration. (Art. 6, sec. 4.)

As to the mathematical problems and the supposed ambiguities arising from the words "more than twice," etc., as complained of by counsel, sec. 413 of the code makes ample provisions for sample ballots for the instruction of voters. "Voting Schools" have been quite common ever since the advent of the Australian ballot.

In my opinion, by those members of the legislature who considered well the language written into this law, this second choice provision was deliberately adopted for the very purpose of necessitating the naming of the proper candidates by a single primary, and to prevent the obvious abuses by which the election might be made fruitless, were this provision omitted.

SULLIVAN, C. J.—This is an original proceeding brought by the plaintiff for a writ of prohibition to prohibit and restrain the defendant, who is secretary of state, from certifying to the several county auditors of the state a list containing the names, postoffice address and party designation of the persons whose nomination papers have been filed with the defendant as secretary of state to be voted for at the primary election to be held August 30, 1910. A general demurrer to the complaint was filed and the case was heard upon the demurrer.

The plaintiff contends that the law commonly known as the primary election law (Sess. Laws 1909, p. 196) in several of its sections is unconstitutional, and that it is so ambiguous and unintelligible as to make it unenforceable and for that reason is void; (2) that the provision of sec. 14 of said law, whereby it is attempted to compel a voter to vote for a first and second choice, is in violation of art. 1, sec. 19, of the constitution of the state of Idaho, which guarantees to every citizen free and lawful exercise of the right of suffrage; (3) that said primary election law is violative of the right of free speech as guaranteed by sec. 9 of art. 1 of the constitution of the state of Idaho, in that it restricts and limits the

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cost of traveling expenses and advertisement; and (4) that the provisions in regard to expenditures other than personal expenses at the commencement of the campaign are ambiguous, unintelligible and for that reason unenforceable; and (5) that it fails to provide for the nomination of precinct officers.

*First and Second Choice, Constitutional.*

The first contention of plaintiff goes to the provision of that part of sec. 14 of said primary election law that requires the voter to vote for a first and second choice, where there are more than two candidates for the same office, and refers to the instructions to be printed at the top of the ballot which are as follows: "Instruction: Mark only your party ticket. Vote for both first and second choice if there are more than twice as many candidates as there are positions." It is first contended that if said provision requiring the voter to vote for a second choice were intended to be mandatory it violates the provisions of sec. 19, art. 1 of the constitution of Idaho, which section is as follows: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage."

It is argued that to compel a voter to vote for a second choice, when there are more than two candidates for the same office—particularly when he has no second choice—would be violative of said provisions of the constitution, in that it would interfere with or prevent the free and lawful exercise of the right of such voter and compel him to vote for a second choice candidate when he did not wish to do so.

It has been well settled by a long line of decisions that the legislature has the power to make at least reasonable regulations in regard to the conduct of elections and the exercise of the right of suffrage. Under the contention of counsel the question arises whether said second choice provision unreasonably interferes with the freedom of the elector in exercising that right. This contention is fully answered by the supreme court of Washington in the case of *State v. Nichols*, 50 Wash. 508, 97 Pac. 728. The court there had under consideration the primary election law of the state of Washing-

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ton, and in that case the same contention was made as the one here under consideration, and the court said: "The elector has the utmost freedom of choice in casting his first-choice ballot, though his choice will not avail him unless at least forty per centum of his party agree with him. It was entirely competent for the legislature to provide that a candidate receiving less than forty per centum of his party vote should not be deemed its nominee, and with such a provision in the law it was incumbent on the legislature to provide some other method of nomination whenever a candidate failed to receive the required vote at the primary. It might have provided a second primary, but a second primary would perhaps prove equally fruitless, unless the number of candidates to be voted for were restricted. If the candidates to be voted for at the second primary were restricted to the two or three receiving the highest vote at the former primary, then all those who did not favor these particular candidates might complain with equal justice that they were compelled to vote for candidates other than those of their choice. So long as voting is by ballot, an official ballot is a convenience, if not a necessity, and some authority vested somewhere in government must determine the names which shall appear on that ballot, and those names must necessarily be few in number; and, we repeat, any reasonable method prescribed by the law-making power which accomplishes this result must be sustained by the judicial department of government. The courts have no concern with its wisdom or policy."

After a careful consideration of this question we conclude that said provision of the primary election law is not in conflict with said provision of the constitution and does not abridge the freedom of the voter or interfere with his right of suffrage. The enactment of said provision was a reasonable exercise of the power of the legislature in said matter, and not in conflict with any rights guaranteed an elector by said provisions of the constitution. However, we think counsel misapprehends the force and effect of said constitutional provision. It is therein declared that no power, civil or military, shall at any time interfere with or prevent the free and

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lawful exercise of the right of suffrage. Those provisions evidently refer to officers, civil or military, being about the polls to meddle with or intimidate electors, and thus to interfere with and prevent them from the free and lawful exercise of the right of suffrage.

*First and Second Choice—Mandatory.*

Sec. 34 of said act provides as follows: "The person receiving a majority of the first choice votes at a primary as the candidate of a party for an office, shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election: *Provided*, That if no candidate shall receive a majority of the first choice votes, then in that event a canvass shall be made of the second choice votes received by the candidates for said office, and said second choice votes shall be added to the first choice votes received by each candidate for such office, and the candidate receiving the highest number of first and second choice votes shall be the nominee for such office of the party nominating him."

It will be observed from the provisions of said section that where there are more than two candidates for the same office, the candidate receiving a majority of the first choice votes is elected as such candidate, but in case neither of the candidates receives a majority of the first choice votes, then the second choice votes of each candidate must be added to his first choice votes, and the one then having the highest number of first and second choice votes is declared elected as the nominee for such office whether he has a majority of the votes cast or not. The legislative intention is clearly apparent from those provisions that if possible each nominee should be selected by a majority vote, first by a majority of the first choice votes, and if that could not be done, then by a majority of the first and second choice votes added together; but in case that no candidate had a majority of the first choice votes or a majority of the first and second choice votes added together, then the candidate receiving a plurality of the first and second choice votes should be the nominee.

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The clear intention of the legislature in enacting said primary election law was to take the matter out of the hands of party committees and conventions and place it in the hands of the voter and secure, if possible, an election by a majority vote, and if neither candidate should receive a majority of the votes cast, then the first and second choice votes should be added together, the one receiving the largest number to be selected as the candidate. In other words, it is apparent that the intention was to secure an election by a majority vote if possible, but in case no candidate should receive a majority of the first choice votes or a majority of the first and second choice votes added together, then, in order to prevent the nomination by a party committee or convention, it was provided that the candidate receiving the largest number or a plurality of the first and second choice votes should be elected, and thus preventing any possibility of a failure on the part of the people themselves to select a candidate.

A construction of said act that might result in taking the nomination of many of the officers away from the electors and place it in the hands of party committees and conventions would be contrary to the legislative intent; and in construing the provisions of said primary election law we have in mind the well-settled rules of statutory construction, one of which is very tersely stated in 2 Lewis' Sutherland on Stat. Const., 2d ed., sec. 363, as follows: "Intent is the spirit which gives life to a legislative enactment. In construing statutes the proper course is to start out and follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature." It is said by the same author at sec. 370 as follows: "When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

The language used in said section 14 in regard to voting for a second choice is as follows: "Vote for both first and

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second choice if there are more than twice as many candidates as there are positions." Said language is a command, and indicates a clear intention on the part of the legislature to require the voter, as a condition on which he might exercise his first choice, that he also express his wish as to a second choice in case of the contingency that no first choice selection be made. This is not an unreasonable regulation.

In the same section we find the following command: "Mark only your party ticket." Is that language directory only? And again, "Do not vote for the same person for both first and second choice." Can anyone reasonably imagine or contend that those provisions are merely directory and may be disregarded by the voter if he desires to disregard them? I think not. Can the voter under said last-quoted provision vote for the same person for both first and second choice and legally insist that his vote be counted? It requires a peculiar temperament to seriously contend that said provisions are merely directory, to be followed or not at the mere whim or caprice of the voter. Those are commands conveyed directly to the voter by being printed at the top of each ballot, and he must obey them or his vote will not be counted for any candidate where a second choice vote is required to be cast. If the legislature had not intended that candidates should be nominated by a majority vote if possible, they certainly would not have injected into said act the provisions for a second choice vote at all. The intention of the legislature which naturally results or is gathered from the context of the act, from the occasion and necessity of the law, from the mischief felt and the remedy in view, is too clear to be misunderstood. Said provision of the statute requiring the voter to vote for both a first and second choice, where there are more than two candidates for the same position or office, is mandatory and not unreasonable.

The language used in that part of sec. 14 last above quoted, wherein it provides that the elector must vote for both first and second choice, is as follows: "Vote for both a first and second choice if there are more than twice as many candidates as there are positions." The legislature evidently had in



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mind that there would often be more than two candidates for the same office, such as governor, lieutenant-governor, secretary of state, etc. They no doubt also had in mind that in the same election there might be more than one congressman to be elected or more than one justice of the supreme court, and in county matters more than one representative from the same county. For instance, some of the counties have three or more representatives. In that case there is more than one position to be filled in the office of representative, and if there are three representatives to be elected and more than six candidates to fill those three positions, the elector must vote for both a first and second choice; but if there were only six candidates to fill the three positions, the voter would not be required to vote for a second choice, as no second choice votes need be cast where there are not more than twice as many candidates as there are positions to fill. So it is clear that under said provision the voter is not required to cast a second choice vote unless there are more than twice as many candidates as there are positions to fill; or in other words, more than twice as many candidates for the same position as there are selections to be made for that office.

We are also satisfied that it was the purpose of the legislature to require the voter to vote for both a first and second choice candidate in order that his ballot may be complete and his intention clear as to his choice of candidates for that particular office. Of course a failure to vote for either a first or second choice candidate for any one office, where such is required, would not affect or avoid the ballot except as to that particular office. We therefore conclude that said provision of the law is mandatory, and that a voter must vote for both a first and second choice candidate if there are more than twice as many candidates as there are positions or offices to be filled.

*Expenditures of Candidates.*

It is next contended that the provisions of said act in regard to expenditures, other than for personal expenses, are ambiguous, unintelligible, and for that reason unenforceable. Sec. 24 of said act is as follows: "No person shall, in order to-

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aid or promote his own nomination to an office under the provisions of this law, directly or indirectly, himself or through any other person, give, pay, expend or contribute, promise to give, pay, expend or contribute any money or other valuable thing or service, except for personal expenses. The words, 'Personal Expenses,' as used in this law shall include only expenses directly incurred and paid by a candidate for traveling and for purposes properly incidental to traveling, and for writing, printing and preparing for transmission any letter, circular or other publication, not issued at regular intervals, whereby he states his position or views upon public or other questions, for stationery and postage, and for the necessary expenses in hiring halls, or other room for the purpose of holding public meetings to address the voters and others upon public questions and matters relating to his candidacy: *Provided*, that no candidate for nomination to any office at any primary held under the provisions of this act shall expend for personal expense or at all in order to aid or promote his own nomination to such office, more than fifteen per cent of the yearly compensation or salary attached to such office." And sec. 25 is as follows: "Every candidate for nomination under the terms of this act, or any amendment thereto shall not more than ten days after the day of holding the primary election at which he is a candidate, file an itemized statement in writing duly sworn to as to its correctness, with the officer with whom his declaration of candidacy or other nomination paper is filed, setting forth each sum of money and thing of value or any consideration whatever, contributed, paid or promised by him or anyone for him, with his knowledge or acquiescence for the purpose of securing or influencing or in any way affecting his nomination to said office. Said statement to set forth sums paid as personal expenses, and stating fully the nature, kind and character of the expenses for which the sums were expended separately and the party or parties to whom the sums were paid and the purpose for which such payments were made; and in this statement all sums or other considerations promised and not paid shall be included. Such statements when so filed

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shall immediately be subject to the inspection and examination of any elector and shall be and become a part of the public records."

It is contended that the definition of personal expenses in said sec. 24 forbids a person from expending more than fifteen per cent of the yearly compensation or salary of the office for which he is an aspirant. It is argued that said provisions are contrary to the provisions of sec. 9 of art. 1 of our state constitution which is as follows: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." There is nothing in that contention.

The provisions of the primary election law in regard to the expenditures of a person in aiding or promoting his nomination for an office in no manner conflict with said provision of the constitution. That law does not attempt to prevent a candidate from freely speaking, writing and publishing his views on all subjects.

It is also argued that said act is ambiguous in that it does not define when the expenses of a candidate begin, whether after acceptance of the nomination or before, and counsel contend that the expenses of a candidate, for which he is required to file an itemized statement under said act, do not begin until the candidate has filed his nomination paper with the proper officer or until after he has filed his acceptance of such nomination. Counsel cite *State ex rel. Brady v. Bates*, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105. That was a proceeding brought by the relator to oust the respondent from the office of sheriff because of the alleged violation of the corrupt practices act of the state of Minnesota. The alleged misconduct grew out of the following transaction: In the spring of 1906 the respondent Bates, then sheriff, one Miles and one Armstead were conspicuous candidates or possibilities for the Republican nomination for the next term as sheriff of St. Louis county. Miles showed to Bates a letter which he claimed to have received from Armstead. The letter set forth that Armstead had great political strength with respect to the nomination for sheriff in the approaching

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primary election, that Armstead was not anxious to mix in the fight, and that if Miles would run, Armstead would stay out and do all he could to help him. The result of the interview was an agreement in words and figures as follows:

“Duluth, Minn., March 30, 1906.

“In return for \$500.00 (five hundred dollars), one hundred of which has been paid and \$400.00 (four hundred dollars) of which is to be paid on or before the last day of filing, I agree to file for the office of sheriff of St. Louis County before the coming election, and to withdraw from the fight on or before the last day of filing. I do this to keep out any opposition to Mr. Bates, and in order to split up the vote if any other candidate should get into the field.

“(Signed) JACK MILES.”

Respondent signed the contract and paid Miles at the time \$75 and afterward \$375 more. The further facts are fully set forth in said opinion, and on that state of facts the relator applied for a writ of *quo warranto*. The opinion is by Jaggard, J. After stating the facts it is said:

“The essential question in this case is whether or not the respondent, Bates, was a candidate for the office of sheriff of St. Louis county at the time at which he entered into the agreement with Miles. If he was then a candidate, within the meaning of the corrupt practices act, he would not be entitled to hold the office, and other questions would be presented. If he was not a candidate at that time, and was not within the prohibition or requirements of the corrupt practices act, then the relator is entitled to no relief.”

The court cites the corrupt practices act and also certain sections of the primary election law of the state of Minnesota, and says that the corrupt practices act plainly distinguishes between a “candidate for nomination to any elective office” and a “candidate for any elective office.” Sec. 350 of the primary law of that state requires the filing of an affidavit of expenditures by “a candidate for nomination or election to an elective office.” In discussing the question when a person under the direct primary system of that state becomes

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a candidate, under the primary law and the corrupt practices act, the court said:

“A party office-holder, under the direct primary system, passes through two similar preliminary stages: (1) Where, having filed his affidavit, he becomes a candidate for nomination by his party at a primary election. (2) Where he has been elected as his party's nominee and is a candidate for election. In the case of the nominee of a convention, the candidate files a list of his expenses, beginning with a date which the law does not fix, but which is determined in accordance with its general rules. It is apparently left to the candidate to fix that date in good faith, and perhaps at his peril. In case of a nomination by direct primary election, the statute definitely prescribes the time, viz., when the eligible person files the affidavit of his intention. As to expenses after that date, he must file a verified statement, but as to those which were incurred before it he is not required so to do. Suppose an office-seeker spends money with the intention of becoming a candidate for nomination at the approaching primary election, but changes his mind and does not file. Must he make a verified statement of his expenses? Failing to do this, is he liable to prosecution for a misdemeanor? Clearly not. No more was the respondent required to make the statement of his expenditures anterior to the time at which he filed his affidavit and thus became a candidate.”

The court there holds under the laws of Minnesota that a candidate was not required to file an itemized statement of his expenditures to promote his nomination prior to the date of filing his affidavit of nomination; that under the laws of that state, after filing said affidavit, the party became a candidate for nomination and not before. The court in that case made the following observations:

“This construction is subject to the objection that it might enable the office-seeker to expend large sums of money to help him secure a nomination, and, by filing as late as the law allows, to escape its penalties, and, in effect, to evade its provisions. The time of filing is, however, so long before the primary election, and that time so long before the actual

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election, as to make that evil seem remote. In ordinary experience, it is likely to occur that the advantage of publicity secured by filing early will overcome any disposition to delay filing with a view to reducing the expense to be reported, and candidates will continue to regulate their filings with reference to considerations of general expediency. However this may be, it is for the legislature, and not for the courts, to remedy the imperfections which may arise in the administration of the law. We have to deal with it as it has been enacted. As enacted, we think that the candidate for nomination upon whom are imposed penalties by the corrupt practices act is, under the direct primary election law, a person who has filed his affidavit of intention, and has thereby become a candidate for nomination under its terms. Before he becomes such candidate, he is not within the provisions of the corrupt practices act."

The court there holds that a person only becomes a candidate after he has filed his affidavit, and that before he files such affidavit, so far as expenditures of money were concerned, he did not come within the provisions of the corrupt practices act of that state, and might spend any amount that he desired to in aid or promotion of his nomination.

The primary election law of this state is different from the primary election law of Minnesota and the corrupt practices act of that state in some particulars. The intent and purpose of the legislature in enacting said secs. 24 and 25 of the primary law was to prevent the large expenditures of money or property by a person, in aid or promotion of his own nomination to any office under the provisions of said law. The first sentence of said sec. 24 is as follows: "No person shall, in order to aid or promote his own nomination to an office under the provisions of this law, directly or indirectly, himself or through any other person, give, pay, expend or contribute, promise to give, pay, expend or contribute any money or other valuable thing or service, except for personal expenses," etc. And the last sentence of said section is as follows: "*Provided*, That no candidate for nomination to any office at any primary held under the provisions of this act

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shall expend for personal expense *or at all* in order to aid or promote his own nomination to such office, more than fifteen per cent of the yearly compensation or salary attached to such office.”

It is clear that the legislature intended by the language there used that no person should be permitted to expend, to aid or promote his own nomination to an office, more than fifteen per cent of the yearly salary of such office, and he is prohibited from expending for personal expenses “or at all” in order to aid or promote his own nomination more than fifteen per cent of the yearly compensation of such office. A positive prohibition is thereby placed upon the expenditure in aid or promotion of the nomination of a person more than fifteen per cent of the salary for a single year. “Personal expenses” are accurately defined in said sec. 24. But the law provides for other expenditures than those defined as personal. Sec. 6 provides that a fee shall be paid, or in lieu thereof a petition shall be filed on behalf of each candidate for office; and sec. 7 provides that the fee to be paid on behalf of any candidate in case no petition be filed asking for his nomination shall be, for any office with a salary of \$300 or less, the sum of \$2; and when such salary exceeds \$300 per annum, an additional sum equal to one per cent thereof on such excess. The law also provides the number of signatures required for the nomination of a candidate by petition, and clearly contemplates that a nomination by payment of the fee requires an expenditure of money, and also a nomination by petition requires the expenditure of money, and so far as the expenditure of money by candidates is concerned, the entire provisions of said act in regard to the nomination of a candidate by the payment of a fee or by petition and the provisions for personal expenses must be construed together. The itemized statement required to be filed by the candidate by the provisions of sec. 25 requires the candidate to set forth “each sum of money and thing of value or any consideration whatever, contributed, paid or promised by him or anyone for him, with his knowledge or acquiescence for the purpose of securing or influencing or in any way affecting his nomina-

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tion to said office," as well as the personal expenses defined by said sec. 24.

The candidate who pays the fee authorized by said law for his nomination must render an account of that in such statement. The candidate who has been nominated by petition must set forth an itemized statement of the expenditures he has made in procuring such petition and all other expenses connected therewith, as well as the expenses defined as "personal expenses" under the provisions of said sec. 24; and the candidate is prohibited from expending more than fifteen per cent of one year's salary of the office sought, for all of said expenses above referred to, incurred to aid or promote his nomination.

The contention that "a person is not a candidate until after he files his nomination papers" and is not required to include in the itemized statement of expenditures to be filed by him any items of expenditure that were contracted or paid prior to filing his nomination papers is directly against the plain intent of said law. It was suggested on the argument in favor of said contention that a person might expend a large amount of money in ascertaining whether he would be a candidate and finally conclude that he would not be a candidate. In such a case if the person did not enter the race for the office to the extent of having his name placed on the primary ballot or voted for at the election, he would not be required to render an account of the money so expended, and of course would not have to file an itemized statement of his expenditures. It is not intended to include persons who may be candidates all of the year around except on election day. It only applies to a man who finally submits his name to the voters on election day. Only candidates whose names are on the primary ticket for nomination or who become candidates by having their names written on the ballot are required to file such itemized statements. Said sec. 24 provides that "No person shall in order to aid or promote his own nomination to an office," etc. It does not say that "No *candidate* after he has filed his nomination papers shall," etc.; but even if the word "candi-



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date" instead of "person" were there used, the conclusion would be no different.

In *State ex rel. Brady v. Bates, supra*, where the court held that a person did not become a candidate until he filed his nomination papers, under the laws of Minnesota, the court said: "This construction is subject to the objection that it might enable the office-seeker to expend large sums of money to help him secure a nomination, and, by filing as late as the law allows, to escape its penalties, and, in effect, to evade its provisions." That statement seems to be weakened by the further statement of that court that the filing is made so long before the election as to make the evil mentioned seem remote. The time under the Minnesota law was twenty days, and in our view not so remote as to prevent what the law was intended to prohibit. I am not in accord with that statement, for it is well known that candidates for nomination at primaries may expend thousands of dollars in promoting their nomination, and have their political machinery in such perfect running order that no further expenditure of money will be required after the nomination papers are filed to keep it running effectively until the last vote is cast at the primary election. Under our primary election law nomination papers may be filed as late as thirty days before the date of the primary election, and to say that thirty days is so long a time as to make the evil attending such large expenditures of money "seem too remote" to be considered would seem to us childlike in its simplicity of belief and suggestion.

Under said primary law to hold that a person may legally expend thousands of dollars in promoting his nomination to an office so long as he does it prior to the date of filing his nomination papers would permit him to do just what said law was intended to prohibit him from doing. It was not the legislative intention to permit a candidate to debauch the electorate and press of the state, if it were possible to do so by a large expenditure of money, provided he did it thirty days before the primary election. The intention was to prohibit a large expenditure of money, or what is called a check-book campaign, in procuring the nomination of any candidate,

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whether the expenditure is made either before or after the filing of his nomination papers. If a contrary construction were placed upon said law, truly might it be classed as a law for the rich man and not a poor man's law as it was termed during its passage through the legislature.

*When is a Person a Candidate?*

The contention that a person is not a candidate until after he files his nomination papers is not in accord with the clear purpose and intent of the primary election law. It is provided among other things in sec. 14 of said act that a blank space shall be provided under each official heading in order that a voter may write in the name of a candidate for any office. It is possible under that provision for a person to be nominated for an office who has not been nominated by paying the fee or filing a petition as required under the provisions of secs. 6 and 7 of said primary election law and whose name is not printed on the ballot. And in such a case the candidate thus selected must file an itemized statement of expenditures the same as a person whose name has been placed on the primary ballot by filing the required nomination papers and paying the fee or by petition.

As above stated, a person may be a candidate at a primary election whose name is not printed on the ballot. In that case he must secure a sufficient number of electors who will write his name on the ballot on election day to accomplish his nomination. If he succeeds in that manner in securing a sufficient number of votes to nominate him, he will be entitled to have his name certified and placed on the official ballot at the ensuing general election. Such a person would nevertheless be a candidate for nomination and would have become amenable to the requirements of the law, and would no more be allowed to violate the penal provision of the primary law than the man whose name was legally printed on the ballot; still there would be as many opportunities open for the expenditure of money and making promises for the candidate whose name was not printed on the ballot as to the man whose name is printed on the ballot. The law was in-

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tended to apply to all persons who may in any way be candidates to be voted for at the primary election and all such are amenable to the provisions of the law. It is clear to us that a man is a candidate for an office at the time he begins to seek such office or lay his plans to procure the nomination for such office.

In *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 220, the court had under consideration the question of when a man became a candidate for an office under the provisions of the constitution and statutes of Pennsylvania, and in the course of the opinion the court said:

"The word 'candidate' in the constitution is to be understood in its ordinary popular meaning, as the people understood it whose votes at the polls gave that instrument the force and effect of organic law. Webster defines the word to mean 'one who seeks or aspires to some office or privilege, or who offers himself for the same.' This is the popular meaning of the word 'candidate.' It is doubtless the meaning which the members of the constitutional convention attached to it, and the sense in which the people regarded it when they came to vote. We therefore say, in every-day life, that a man is a candidate for an office when he is seeking such office. It is begging the question to say that he is only a candidate after nomination, for many persons have been elected to office who were never nominated at all. We hold, therefore, that the defendant was a candidate for office within the meaning of the constitution as well as the act of 1881. If, while such candidate, he was guilty of either bribery, fraud, or the wilful violation of any election law, he comes directly within the terms of the constitutional provision. . . . When laws are made by a popular government, that is to say, 'a government of the people, by the people, and for the people,' we may safely assume that words in a statute or a constitution are used in a sense in which the people who made the statute or constitution understood them. . . . As before observed, the constitution must be construed liberally so as to carry out, and not defeat, the purpose for which it was adopted. If we give it the narrow construction claimed for it, a candidate

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for office might resort to all manner of bribery and fraud in procuring his nomination; yet if he conduct himself properly after his nomination, he could wholly evade the constitutional prohibition. This applies with special force to cases where a nomination is the equivalent to an election. In such instance the nominee may well be an honest man between his nomination and election, for he has no motive to be a rogue."

So, under our primary election law a person is considered to be and is a candidate for an office when he begins to seek a nomination for that office, and if we give the narrow construction contended for by counsel to the term "candidate," the very object and purpose of the statute would be defeated and a candidate for office might resort to all manner of bribery, promises and expenditures of money in procuring his nomination up to the time he filed his nomination papers, and if he should after that time not commit any bribery, not make any promises, and not make any expenditures of money in aid or promotion of his nomination, he would wholly evade the penal provisions of said statute; and as said in *Leonard v. Commonwealth, supra*, "This applies with special force to cases where a nomination is the equivalent to an election. In such instance the nominee may well be an honest man between his nomination and election, for he has no motive to be a rogue."

So under our primary election law, if a candidate were permitted to expend any amount of money he desired to expend prior to the date of filing his nomination papers, and only had to account for the money that he expended between the filing of said papers and the primary election, there would be no motive for him to violate the law.

A person seeking a nomination under our primary election law for an office becomes a candidate whenever he begins to lay his plans to aid or promote his nomination. Any other construction placed upon said act would be contrary to the letter as well as the spirit of said act, for the clear intention is to bring every person seeking a nomination at a primary election within the prohibitory provisions of said act just as soon as he does some overt act or thing in promoting his candidacy or in aid or promotion of his nomination. We therefore

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hold that a person who begins and continues to seek a nomination for a public office, under the provisions of said act, up to and including the day of the primary election, must file the itemized account provided for by said secs. 24 and 25, and is subject and amenable to the penal provision of said act.

*Failure to Provide for Nomination of Precinct Officers.*

It is contended that said primary election law makes no provision for the nomination of precinct officers and is defective in that regard. It is provided, among other things, in sec. 29 of said act as follows: "A county or state central committee may elect its chairman, secretary or other officer, and fill vacancies in said committee, and shall have the power to make its own rules and regulations, and prepare and announce party principles, and platforms, call platform conventions, elect delegates to platform conventions, county, state or national, provide for the election of such delegates otherwise, fill vacancies on the ticket, provide for the nomination of candidates to fill vacancies, or for offices not required to be nominated as herein specified, and may perform all other functions inherent in such organizations by virtue of law or custom, not inconsistent with the terms of this law, the same as if this law had not been enacted."

That section conclusively provides a method for the nomination of precinct officers. It provides for the filling of certain vacancies and for the nomination of candidates to fill offices which are not required to be nominated under the provisions of said act. There being no provision for the nomination of precinct officers in said act, those officers may be nominated in any reasonable way that may be provided by the party organization. Thus said act leaves the nomination of precinct officers with the party county or precinct organizations and provides for such nominations in that way. There is nothing in said contention.

We therefore conclude that the provisions of said primary election law in regard to the voter being required to vote for a second choice, where there are more than twice as many candidates as there are positions to fill, are mandatory; that

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a failure to vote for a second choice would not invalidate the entire ballot but only so far as it applied to the candidate for an office where a second choice vote is required; that the persons or candidates for nomination at a primary election are required to file with the proper officer an itemized statement of their expenditures as provided by secs. 24 and 25 of said act covering and including all such expenses from the time such person or candidate began seeking such office or began laying his plans or doing some other overt act to aid or promote his nomination to the office sought by him, whether his name be placed upon the ballot by filing nomination papers and paying the proper fee or by filing his petition, or by procuring voters to write his name in the blank space left on the primary ballot for writing a candidate's name thereon; and that said act makes ample provision for the nomination of precinct officers.

The alternative writ is quashed and the peremptory writ denied. No costs are allowed to either party in this proceeding.

AILSHIE, J., Concurring.—The chief justice has so fully and clearly covered the questions raised that there seems but little left to be said. The importance of this case and the newness of the field of legislation covered prompt me to add a few observations to what has been so logically stated by the principal opinion and in which I fully concur.

I shall briefly state some additional reasons which have led me to the unavoidable conclusion at which the court has arrived in this case, with reference both to the mandatory nature of the first and second choice requirements of the law and the expenditures by candidates.

#### *First and Second Choice.*

In the outset it should be remembered that the right to vote or to exercise the elective franchise is not an inalienable right but is rather a privilege conferred by the state. (15 Cyc. 280, 281.) It is a purely political right granted by the people collectively in the exercise of the political powers of the state.

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Opinion of the Court—Ailshie, J., Concurring.

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In this state the framers of the constitution by sec. 3, art. 6 thereof, placed certain restrictions and limitations upon the right to vote and hold office. Not content, however, with these limitations and restrictions and differing from many other state constitutions, they added the provisions of sec. 4, art. 6, which say: "The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."

It follows unmistakably that under our constitution the legislature has the right to prescribe the "limitations and conditions" under which the right of suffrage may be exercised, and that it was within the legislative discretion and power to say to every citizen that he shall under certain circumstances, if he votes at all, indicate both a first and a second choice for an officer. Every voter takes the chances at every election of losing his vote in so far as the selection of his particular candidate is concerned, but the legislature has by this act endeavored to in a measure protect each voter against such contingency unless an opposing candidate has obtained a majority of all the votes cast.

When I consider the moving purpose of the lawmakers in the enactment of this law and the imperative form of the verb used in section 14 of the act, and the reasons which must have led to the insertion of the second choice feature of the act, I can arrive at no other rational conclusion than that it was intended to be mandatory. The same form of verb is used in directing the voter to "mark only" his party ticket and to "not vote" for the same person for both first and second choice, and yet I presume no one would contend that *these provisions* are not mandatory. It was intended to reduce to a minimum the possibilities of thwarting the will and purpose of the people in the selection of party candidates, and at the same time have every choice or selection represent as nearly as might be a majority of the electors of his party. This purpose can only be accomplished, if at all, through a *mandatory second choice*. An *optional second choice* would at once open up avenues and possibilities for organization and deception of

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Opinion of the Court—Ailshie, J., Concurring.

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voters that would render the second choice a snare for the unwary and a plaything for the crafty. If only optional, it would at once become a race between opposing candidates and their supporters to see who could organize the largest number of his followers to vote only a first choice so that no unbiased preference might be expressed by his supporters to be counted in the contingency of no first choice selection. Such an organization would give the best organizer the largest possibility of second choice votes from the first choice supporters of the opposing candidates. The race would then be won by the best organizer and manipulator. This is one of the things that law was intended to discourage and minimize as far as possible in the selection of candidates. However far in actual practice the law may fall short of accomplishing its purpose in securing a free and unbiased expression of the people in the selection of party nominees, it will still remain a fact that the spirit and intent of the law is written large all through the act and points to the unmistakable purpose to make the second choice mandatory.

It was suggested on argument that a voter might have no second choice. That is wholly improbable with one who cares to vote at all. After the voter has expressed his first choice, he will in all probability still have a *preference* among the other candidates whose names are printed on the ballot, but if he should be unable to choose between them he may write the name of someone else on his ballot. There are as many chances that a voter may not find his *first choice* printed on the ballot as that his second choice may not be there. It sometimes happens that the voter's *first choice* is not a candidate for office, but that does not deprive him of doing the next best thing in choosing among those who are candidates.

#### *Expenditures of Candidates.*

On the question of expenditures by candidates but little has been said by counsel for petitioner. Counsel who argued the case on behalf of the secretary of state take different views, the assistant attorney general contending that secs. 24, 25, 26, and 28, limiting the expenditures, apply only to a candidate



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Opinion of the Court—Ailshie, J., Concurring.

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after his nomination paper or petition has been filed and he has accepted the nomination; while other counsel insist that these sections of the act cover all expenditures a candidate may make at any time for the purpose of furthering his interests and promoting his nomination. Now, it seems to me that the unbiased person reading these provisions of the law, which are in very plain and simple language, would never suspect, unless it was suggested to him, that there is any limitation as to time either expressed or implied in the statute. It is only the suggestion that we construe into it a limitation that raises any question or discussion at all on that point. The expenditure is limited, but the time within which that limited expenditure may be made is wholly unlimited. The *purpose* of the expenditure is the test of its lawfulness without reference to time.

In a popular government the laws are supposed to reflect the will of the people, and to be in such language and form as the people understand, and thus we differ from the rule of Caligula, who wrote his edicts so small and hung them so high the people could not read them. Modern laws are made to be read by the people, and indeed the law presumes that every one of its subjects knows and understands its terms and provisions. In order, therefore, to reach a reasonable and sensible construction of the law, words that are in common daily use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold the law. It is a plain perversion of any law to construe it in the light of the logic of refined technicalities. The farmer, the miner, and the day laborer all alike have a common and very clear understanding of the meaning of words in daily use among them. To them and the great mass and body of the people the word "candidate" has a well-defined meaning. They understand a candidate to be one who is presenting himself as an aspirant or applicant for an office or position—one who is seeking a nomination or election to a position or office.

When a man is spending his money in employing and sending out workers, or perfecting an organization, or advertising

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Opinion of the Court—Ailshie, J., Concurring.

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and exploiting himself, or influencing public opinion in his favor or against an opponent, or in numerous other ways that present themselves to the office-seeker, for the purpose of increasing and enhancing his ultimate chances of nomination for a given office, he is for all practical purposes a "candidate" for such nomination, and the people so understand it. In this respect the reasoning of the learned justice in *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 220, is unanswerable. Our primary election law does not attempt to define who is a candidate for nomination. On the contrary, it recognizes the right of every elector qualified to hold the office to be a candidate for nomination to that office. It attempts to regulate the conduct of a candidate in seeking a nomination, and prescribes terms and conditions on which he can have his name printed on the official primary ballot, but the fact that he neglects or fails to get his name printed on the ballot does not prevent his being a candidate, although it greatly diminishes his chances for the nomination. (See *State v. Nichols*, 50 Wash. 508, 97 Pac. 728.)

That anyone is a candidate who seeks a nomination at the primary, whether his name be printed on the official ballot or not, is borne out by the statute itself, and is accentuated by both secs. 14 and 30, wherein it calls one a "candidate" whose name is written on the ballot by the elector himself.

In order to command respect for and compliance with the requirements and mandates of the law, the legislature thought it wise to incorporate in the act certain prohibitive and penal provisions which correspond very closely with provisions of the "criminal practices acts" of some of the states and very similar to provisions found in the primary election laws of the state of Washington (1909 Sess. Laws Wash., pp. 176-179). These are proper incidents to such a law, and highly necessary to its efficiency in order to enable the law to reach out and lay hold on those who refuse it obedience. They deal chiefly with those who tamper with and influence voters and attempt to control the means and avenues of publicity. It pronounces severe penalties for its violation. The purpose was to give worth and ability an even show in the race for

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Opinion of the Court—Ailshie, J., Concurring.

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public office as against trickery, cunning and money. That idea has been unmistakably written into the law, and it only remains to be seen whether it can be accomplished in practice as it has been written in theory.

But it is said that the statute does not say *when* the candidate shall begin to keep account of his expenditures and does not specify the period of time *in or during which* the limitation of expenditures runs. This is clearly answered by sec. 24 of the act. It says, "*No person shall, in order to aid or promote his own nomination to an office . . . give, pay, expend or contribute or promise to give, pay, expend or contribute,*" etc., any money or thing of value except for personal expenses, and then the section is ended with the proviso that, "No candidate for nomination to any office at any primary . . . shall expend for personal expenses or at all in order to aid or promote his own nomination to such office more than fifteen per cent of yearly compensation or salary attached to such office." When the law says that no person "*shall expend for personal expenses or at all*" exceeding a fixed sum, it seems to me that covers *all* times and *all* expenditures. The important question is not *when* did a man become a candidate, but *did* he expend money at any time in violation of the statute to "aid or promote" his nomination to office. It becomes purely a question of fact in each case to be established in the same manner that any other fact is established. This is the plain and natural import of the language written into the law, and any other construction would be strained and wholly unjustified.

The purposes and object of this law are clear, and its main and substantial features are not difficult to understand. In many of its minor details it might have been made much more explicit, but those are more matters of form and detail of administration than of substance.

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Argument for Appellant.

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(August 13, 1910.)

MAY McELROY JACKSON, Respondent, v. THE INDIAN CREEK RESERVOIR DITCH AND IRRIGATION CO., LTD., Appellant.

[110 Pac. 251.]

WATER CONTRACT—PRO-RATING AMONG HOLDERS OF CONTRACT—ABANDONMENT OF RIGHT — RIGHT BY USER — EXTINGUISHMENT OF CONTRACT.

(Syllabus by the court.)

1. Under the facts and circumstances of this case, *held*, that the equities are with the respondent, and that the judgment of the trial court should be affirmed.

2. *Held*, that there are sufficient facts and circumstances shown by the record to support the findings and judgment of the court to the effect that certain holders of water contracts had abandoned their water rights and ceased to use the same or claim or assert any right under them for more than five years.

3. Where it is contended, as in this case, that one of the parties to the action has by purchase or otherwise acquired the rights of both of the contracting parties to a given contract granting a perpetual water right, and that such party is successor in interest by purchase or otherwise of all of the rights held by both the obligor and obligee, and the party seeks a decree whereby it may be permitted to pro-rate as successor to such contracts with the holder of another like and similar water contract, *quære*, as to whether such facts constitute an extinguishment of the original contract.

APPEAL from the District Court of the Third Judicial District for Ada County: Hon. Fremont Wood, Judge.

Action on water contracts to declare the respective rights and priorities of the parties. Judgment for plaintiff. Defendant appealed. *Affirmed*.

Hawley, Puckett & Hawley, for Appellant.

This court has already passed upon the law controlling this particular case. (*Jackson v. Indian Creek etc. Co.*, 16 Ida. 430, 101 Pac. 814.)

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Argument for Respondent.

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The main contention of appellant in this case is that the former decision of the supreme court has been misconstrued and matters reconsidered which were settled absolutely as the law of the case in the former decision. (Spelling, New Trial and App. Prac., par. 691.)

Karl Paine, for Respondent.

The water rights acquired under similar contracts were extinguished the moment abandonment occurred. The Orchard Irrigation Company contracted to deliver to plaintiff sufficient water for the irrigation of her land. But the plaintiff never received what the company pretended to convey to her until after users under similar contracts had abandoned their rights. A second sale by an irrigation company or an attempted user of the water by it should be enjoined, for to permit the company to sell or use water under these circumstances would work an effectual fraud against former purchasers of water rights. If the plaintiff had been entitled to this relief as against the Orchard Irrigation Company, we are entitled to like relief as against the defendant. (*Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359.)

Under the law of water and water rights, the same distinction exists between abandonment and adverse user as exists in the law of mines and mining rights between abandonment and forfeiture. (Long on Irrigation, secs. 82, 83.)

The contract must be read in connection with secs. 4 and 5, art. 16, of the constitution of this state, which sections form a part of the contract.

Therefore, under the circumstances of this case, we acquired a prior right to the use of the waters of the defendant's reservoir the instant the users of water under similar contracts abandoned their water rights. A construction of plaintiff's contract which would compel her to pro-rate with subsequent purchasers would be contrary to the letter and spirit of this section. (3 Farnham on Waters and Water Rights, p. 2101.)

## Opinion of the Court.

PER CURIAM.—This case was heard once before on appeal, and the opinion of the court is reported in 16 Ida. 430, 101 Pac. 814. After the case was remanded it was again tried in the district court and an appeal was taken from the second judgment, and that appeal was heard at the January, 1910, term of this court. Subsequently a petition for a rehearing was filed and granted by the court.

The principal facts of the case are set out at some length in the original opinion and we will not therefore restate them here. This action is based on a contract for a water right dated March 22, 1895, and it was held in the former opinion of this court that the contract was a valid and subsisting contract between the parties and that the parties and their successors in interest were bound thereby. That contract contained a provision to the effect that in case of unforeseen or unavoidable accident which might result in diminishing the supply of water, or if the volume of water should prove insufficient from drought or any other cause beyond the control of the company, the second party to the contract should have her *pro rata* share of the water which the company might have for distribution, and that the company should not be liable for the shortage or deficiency, but should have a right to distribute such water as it might have through its canals to the holders of such water right contracts, *pro rata*, provided that such contracts placed the holders thereof upon an equality, and conferred on no one of such persons a prior or superior right over any other person holding a like contract. The court there held that the terms of the contract negatived the idea of a priority as between those holding such contracts, and that said contracts specifically limited the respondent's right to a *pro rata* share in case of a shortage or scarcity of water, and that the trial court erred in its prior decision wherein it held that the plaintiff had a prior right to the use of the waters from said reservoir.

The case was sent back for the trial court to determine two questions and to enter judgment accordingly. The trial court was directed to determine, first, the number of inches necessary for the proper irrigation of plaintiff's land de-

## Opinion of the Court.

scribed in said contract; second, the number of acres of land included within other and similar subsisting contracts for water from said reservoir. In the course of that opinion the court said:

“Inasmuch as a new trial must be granted in this case, it will be necessary for the trial court to ascertain the number of acres covered by similar contracts not exceeding the 8,400 acres for which it was intended to supply water and to give plaintiff her *pro rata* share thereof. If, however, a less number of acres has been covered by such contracts, then whatever the total of such acreage may appear to be, when proof is taken, the plaintiff should have her *pro rata* share of such water, and upon this question and the question as to the quantity of water necessary for plaintiff, proof should be taken by the trial court and judgment thereupon entered in accordance with this opinion.”

After the case was remanded to the lower court the plaintiff amended paragraph 9 of her complaint, and after alleging the execution and delivery of the contract and the nature thereof the amendment reads as follows:

“That because the water supply proved insufficient as aforesaid, some of said purchasers of water rights never used any of the waters of said reservoir in the irrigation of their lands or otherwise applied it to a beneficial use, and all the other purchasers of said water rights, except plaintiff, ceased to irrigate their said lands or to otherwise apply any of the waters of the said reservoir to a beneficial use, and ceased to use it at all after the year 1901, and all of said purchasers of said water rights, except plaintiff, wholly abandoned their said contracts and the right to use any of the waters of the said reservoir prior to the commencement of this action, and wholly abandoned their said lands, and permitted the same to be sold for taxes and tax deeds to be issued therefor to Ada county; that the defendant never claimed to own any right to use any of the waters of said reservoir by virtue of any contract delivered by the Orchard Irrigation Company of Idaho, or by virtue of any other contract or agreement, and it never owned and does not now own or hold said contracts

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Opinion of the Court.

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or any of them, as assignee or otherwise, or any other contract or agreement granting to it the right to use the waters of said reservoir, or any part thereof, and it is not now and never was the owner of any water right in or to said reservoir or ditch or the waters therein by virtue of any contract or agreement whatever; that for more than five years next preceding the commencement of this action the plaintiff was the sole and exclusive user of the waters of said reservoir, and is the owner of a first and prior right to the water of said reservoir and ditch in an amount to properly irrigate her said eighty-acre tract."

After the proofs were submitted the trial court made a finding in substantially the same language as this amendment and found every fact as alleged by the amendment. He found that all the water users and consumers, who held contracts similar to the one held by the plaintiff, had abandoned their rights and ceased to use any water from the reservoir ever since 1901. He also found that the appellant never owned any contract for the use of water under this canal, and that in purchasing the reservoir and canal system and lands it never secured any of these water rights. He further found that the plaintiff had for more than five years been the sole and exclusive user of water from this reservoir and canal system.

The trial court entered judgment in favor of the plaintiff for a prior right of fifty inches for the irrigation of her land, on the evident theory that there was no other outstanding contract similar to hers, and therefore no other holder of a similar contract entitled to pro-rate with her. The appellant irrigation company contends, however, that this holding of the court was erroneous, for the reason that it is the successor in interest both of the original reservoir and canal company and also of the original land owners who purchased these contracts. The appellant insists that since it has purchased the land, to which these water contracts were appurtenant, that it owns the land with all of its appurtenances, including the water rights purchased for the benefit of such land.



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Opinion of the Court.

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The complications of this case have proven perplexing to this court, but after a further consideration of the case, we are of the opinion that the equities are with the respondent. In the consideration of this case it has also occurred to us, first, that since the land owners who purchased these water rights have all (except the respondent) absolutely abandoned their land and their water rights for a period of more than five years and allowed the land to be sold by the county for taxes, that this is a very strong evidence of abandonment in fact by the owners of these water rights. If it once be conceded as a fact that they did abandon their water rights, it would then inevitably follow, as a legal proposition, that the respondent might acquire the right to use the water either by appropriation or application to a beneficial use or under a rental from the ditch or canal company owning the paramount appropriations and water right. (Long on Irrigation, secs. 82 and 83.) If abandonment once be conceded, then of course another appropriator or user of the water may acquire the right to the thing abandoned without claiming that right under the law of adverse possession. Secondly, another difficulty has presented itself to our minds and that is, that if the appellant company is the successor by purchase or otherwise of all the rights of the original reservoir and canal company, and is likewise the successor by purchase or otherwise of all the rights of the original land owners who purchased these water contracts from the original canal company, then the rights of both the obligor and obligee are merged in one and the same corporation, and it would therefore be difficult for the appellant to come in and claim that it has water contracts with itself under which it is entitled to pro-rate with the respondent. (*Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. 407.) In other words, if this company claims under those contracts, it is placed in the anomalous position of contracting with itself for a perpetual water right by paying itself an annual water rate, and would therefore have to invoke all process against itself in order to obtain compliance with the contract.

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Points Decided.

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This condition, it seems to us, might result in an extinguishment of the contract, or rather a merger of the duty on the one hand to comply with the contract and the privileges acquired on the other hand under the contract, and that the result would be an extinguishment of the contract. In any event, it appears to us that it would be inequitable for the court to now allow the appellant itself, the owner of the reservoir and canal system, to successfully assert its right to prorate with the respondent in the distribution of water to the extent of the amount necessary for the successful irrigation of respondent's tract of land. It appears that fifty inches is not too much for the irrigation of the amount of land she has been cultivating.

In view of the facts and circumstances surrounding this case, we think substantial justice has been done by the decree of the trial court, and it will therefore be affirmed. Since we have reached a different conclusion on this rehearing from what we reached in the original opinion at the January term, that opinion will not be reported and this will serve as the only opinion in the case.

Judgment *affirmed*, with costs in favor of the *respondent*.

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(August 13, 1910.)

In the Matter of the Application of FRED BOSSNER, for a  
Writ of Habeas Corpus.

[110 Pac. 502.]

SUNDAY REST LAW—PUBLIC AMUSEMENTS—MOVING PICTURE SHOW—  
STATUTORY CONSTRUCTION.

(Syllabus by the reporter.)

1. A moving picture show or exhibition comes within the inhibition of sec. 6825, Rev. Codes, which forbids the opening or conducting upon Sunday of "any theater, playhouse. . . . circus or show. . . . or any such place of public amusement."

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Argument for Defendant.

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2. Words used in a statute without any technical meaning or application should be given their ordinary significance as they are popularly understood, and the language used by the legislature must be construed in the light of the common acceptance of the terms employed.

Original action in this court for a writ of *habeas corpus*. The petitioner was convicted of the crime of keeping open a place of public amusement on Sunday, such amusement consisting in opening and conducting what is alleged to be a theater known as "The Boz" in Boise, and therein producing a moving picture exhibition to which he admitted the public on payment of an admission fee. The prosecution was had under sec. 6825 of the Rev. Codes.

C. M. Kahn, J. F. Nugent, and A. H. Brickenstein, for Petitioner, file no brief.

D. C. McDougall, Attorney General, J. H. Peterson, O. M. Van Duyn, Assistants, and H. S. Kessler, for Defendant.

If the language of the statute enumerating the prohibited amusements does not include a moving picture show, or any other kind of a public show or theater, it means absolutely nothing at all.

Webster defines theater as being: "1. An edifice in which dramatic performances or spectacles are exhibited for the amusement of spectators. 2. Any room adapted to the exhibition of any performances before an assembly, as public lectures, scholastic exhibitions, anatomical demonstrations, surgical operations before a class," etc.

"Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people shall be given the same meaning in the statute as they have among the great mass of people who are expected to read, obey and uphold them." (*Adams v. Lansdon*, ante, p. 483, 110 Pac. 280.)

The opinion of the court was delivered orally from the bench by

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Opinion of the Court—Ailshie, J.

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AILSHIE, J.—It is contended by the state that a moving picture show or exhibition is popularly designated and called a theater, and that it comes within the prohibition of the statute which forbids the opening or conducting of any theater, playhouse, or show, etc., on Sunday.

As was said by this court in *Re Hull*, ante, p. 475, 110 Pac. 256: "It is difficult to tell the exact theory on which the lawmakers drafted this section of our statute. The amusements enumerated and prohibited are not similar or kindred amusements. There is apparently nothing common to all of them, except that they are all *public amusements*." We can only judge the spirit and intent of the statute from the language employed and the class of amusements prohibited. The prohibition in some cases seems to have been based on the theory of advancing the public health, in others the public morals, and still others to promote public peace and quiet on Sunday, while other amusements are forbidden apparently for the sake of affording rest to the employees. The purpose to provide rest for employees is more completely covered and evidently more directly aimed at by the provisions of the preceding section. (Sec. 6824.)

The petitioner contends that a moving picture exhibition is not a theater, playhouse or show, and that it is not "any such place of public amusement." It may be conceded for the purposes of this case that a moving picture exhibition or show is not a theater within the technical meaning of that word as given by the standard authorities. It is equally clear, we think, that such an exhibition or show is classed and considered as a theater within the common and popular acceptance of that word. Such a place is commonly referred to as a theater or moving picture show. It is a well-established rule of law that when words have not a technical meaning or application, or when they have not been so used or employed in the statute, they should then be given their ordinary significance as they are popularly understood. We must construe the language here used by the legislature in the light of the popular and common acceptance of the terms there employed. Construed in that light, we have no doubt

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Opinion of the Court—Ailshie, J.

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but that the legislature intended to include the moving picture exhibition, whether it be called a theater, show or playhouse, or just "Boz." If it is not a theater or show within the specific enumeration of the statute, then it is so much alike and similar to the theater or show that we would not undertake or assume to make a distinction or point out a difference. For instance, a theater implies a dramatic production where the characters appear on the stage before the audience. The moving picture exhibition produces a picture of the same thing before the audience. In the moving picture exhibition of this performance all the movements and actions are to be seen the same as when the characters are on the platform, but nothing can be heard; that is left to the imagination. One is the real thing; the other is a picture of it. There is considerable similarity, therefore, between the two.

The legislature in adding to the statute (sec. 6825, Rev. Codes) the general words, "or any such place of public amusement," evidently intended to prevent the keeping open of any one of the enumerated amusements, either under the name there designated or any other name that they might be given. They must have also intended to prevent their operation under changes or modifications of any of the enumerated amusements. Further, they might have had in mind the fact that there is constant development and improvement in all amusements, and that as this process of evolution goes on, the statute should still cover an amusement similar to one specifically enumerated, even though such amusement might be improved upon but still fill the same purpose and want that was supplied by the originally designated amusement. When the legislature passed this act moving picture shows were commonly called "theaters" or "dime theaters," and indeed, we are of opinion that that appellation is quite common yet. We are very strongly of the opinion that the legislature thought when they used the word "theater" or "playhouse" that there would be no question but that the moving picture theater or show would be included and covered by those terms.

It has been argued that the word "or" as used between the word "circus" and the word "show" indicates a clear

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Opinion of the Court—Ailshie, J.

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purpose to use the word "show" as synonymous only with "circus." Under most constructions I think that would be correct, but in view of the fact that this statute is written with the word "or" understood and omitted after every word, and not "and," it seems to us that the fact that the word "or" is used between "circus" and "show" does not justify the construction claimed by counsel for the petitioner. If the word "and" had been used or was understood, I think there might be some reason for that construction; but the fact that "or" is omitted between all these other enumerated amusements indicates to my mind that it has the same significance between "circus" and "show" that the omitted "or" has between any other names of the enumerated amusements that have been prohibited by the statute.

Much that has been said by the counsel in this case on both sides is very applicable and should appeal very strongly to the legislature, but we did not write the statute. It is only our business to construe it as we find it, and to give it as nearly as possible the construction that we think the legislature had in mind when they enacted the statute. It is our business to say what the law is as nearly as we can determine that fact and not what it ought to be.

The petition is *denied*.

Sullivan, C. J., concurring.

(July 28, 1910.)

G. SPONGBERG, Appellant, v. FIRST NATIONAL BANK  
OF MONTPELIER, Respondent.

[110 Pac. 716.]

SPECIFICATION OF ERROR—POWERS OF THE BANK CASHIER—RATIFICATION  
OF UNAUTHORIZED ACT OF CASHIER.

(Syllabus by the court.)

1. *Held*, that under the facts of this case the specifications of insufficiency of evidence to sustain the decision are sufficient to authorize and require the court to examine the evidence on appeal.

2. In contemplation of law, the leasing of property belonging to a national banking association is not within the ordinary powers and duties of the cashier of the bank.

3. Where the cashier of a national bank has entered into a contract to lease certain of the bank property for a term of years and it does not appear that he had any express authority from the board of directors to do so, but it does appear that the contract signed by the cashier and the lessee has been in possession of the bank for eighteen months, and that at least a majority of the directors of the bank had knowledge of the contract and its terms and conditions, and that the cashier was exercising the power and authority of leasing the bank property, and especially vacant rooms in the bank building, and that the bank's building committee or its board of directors made changes in the plans and specifications of its building on the suggestion of the lessee and incorporated the same in the building as erected, and finished the room to be occupied by the lessee in accordance with his request and suggestions, and the board of directors never repudiated the contract or notified the lessee that they would not live up to the same until after the expiration of eighteen months and the completion of the building, *held*, that such acts and conduct on the part of the board of directors amounted to a ratification of the action of the cashier and rendered the contract entered into by him the contract of the bank.

APPEAL from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bear Lake. Hon. Edward A. Walters, Judge of the Fourth Judicial District, presiding.

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Argument for Appellant.

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Action for specific performance. Decree for defendant, and the plaintiff appealed. *Reversed.*

T. L. Glenn, for Appellant.

The plaintiff claims that E. A. Burrell, who entered into the contract for a lease with the plaintiff, being the vice-president, acting president, director and cashier of the defendant bank, member of the building committee for the erection of the bank building, and general manager and sole agent for the purpose of leasing and renting all the rooms in the said building, had authority to bind the defendant in the execution of the said agreement for a lease. (*Bank v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. ed. 49; *Caldwell v. Bank*, 64 Barb. (N. Y.) 333; *Bank of Vergennes v. Warren*, 7 Hill (N. Y.), 91; *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24; *State v. Commercial Bank*, 6 Sm. & M. (Miss.) 218, 45 Am. Dec. 280; *City Bank v. Perkins*, 4 Bosw. (N. Y.) 420.)

The act of an officer of a corporation is the act of the corporation. (*Carroll v. St. John Society*, 125 Mass. 565; *Cohn v. Borst*, 36 Hun (N. Y.), 562; 12 Am. & Eng. Ency. 997, note 8.)

A lease by an officer of the corporation is ratified by the silence of the directors. (Clark & Marshall, Corp., p. 3774, sec. 716.)

Acts of officers are binding unless timely steps are taken to disaffirm such contracts. (Elliott, Private Corp., pp. 204, 206; *Augusta T. & G. R. Co. v. Kittel*, 52 Fed. 63, 2 C. C. A. 615; *Penn. Ry. v. Keokuk & H. Bridge Co.*, 131 U. S. 317-381, 9 Sup. Ct. 770, 33 L. ed. 157; *Fitzgerald etc. Const. Co. v. Fitzgerald*, 137 U. S. 109, 11 Sup. Ct. 36, 34 L. ed. 608; *Indianapolis Rolling Mill v. St. Louis etc. R.*, 120 U. S. 256, 7 Sup. Ct. 542, 30 L. ed. 639.)

Long acquiescence with full knowledge of the situation amounts to a ratification. (*Egan v. Grece*, 79 Mich. 629, 45 N. W. 74, 77; 7 Words and Phrases, 5931; *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 36 Am. St. 182, 34 Pac. 157; *Hoosac*



## Argument for Respondent.

*Min. & Mill Co. v. Donat*, 10 Colo. 529, 16 Pac. 157; *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848.)

Clark & Budge, for Respondent.

"The brief of appellant must contain a distinct enumeration of all errors relied on." (*Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Ida. 5, 93 Pac. 789; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791; *Penny v. Fellner*, 6 Okl. 386, 50 Pac. 123; *First Nat. Bank v. Brown*, 20 Utah, 85, 57 Pac. 877.)

"Where appellant's brief contains no specifications of error as required by supreme court rule, the judgment will be affirmed." (*Hickey & Co. v. Kaufman*, 34 Mont. 106, 85 Pac. 870; 1 Dec. Dig. sec. 758 (1), and cases cited; *Smith v. Alphin*, 150 N. C. 425, 64 S. E. 210; *Ferguson v. Bank* (Okl.), 99 Pac. 641; *Lehane v. Railway Co.*, 37 Mont. 564, 97 Pac. 1038; *Kansas etc. Livestock Co. v. Hartstein*, 6 Kan. App. 864, 50 Pac. 510.)

Appellant's brief discloses that no attempt has been made to assign or specify any errors whatsoever. He simply argues the case as a whole without calling attention to any particular finding or findings, or any particular ruling upon the evidence. This is not sufficient to entitle him to a consideration by the court of errors committed, if there happen to be any in the record. (*Hannan Bros. v. Waltenspiel*, 29 Utah, 466, 82 Pac. 859.)

The appellant must specify particularly the particulars in which the evidence is insufficient before the court will concern itself with the question as to whether or not the decision is justified by the evidence. (Rev. Codes, sec. 4428; *Gaffney v. Hoyt*, 2 Ida. 199, 10 Pac. 34; *Hollister v. State*, 9 Ida. 8, 71 Pac. 541.)

The following specification, "The evidence as a whole is insufficient upon which the decision is rendered, and the judgment made and entered thereon," is not sufficient to authorize the court to examine the evidence to find out whether it sus-

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tains the decision. (*Parker v. Reay*, 76 Cal. 103, 18 Pac. 124; *In re Strock*, 128 Cal. 658, 61 Pac. 282; *Hughes v. Meehan*, 84 Minn. 226, 87 N. W. 769; *Van Pelt v. Park*, 18 Utah, 141, 55 Pac. 381.)

The other so-called specifications are mere recitals of what appellant contends the evidence shows, but are not specifications of the particulars in which the evidence is insufficient. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.)

The particulars in which it is claimed the evidence is insufficient must be pointed out. (*Robson v. Colson*, 9 Ida. 215, 72 Pac. 951; *Hole v. Van Duzer*, 11 Ida. 79, 81 Pac. 109.)

The alleged specifications should, because of their insufficiency, be disregarded. (*Humphrey v. Whitney*, 17 Ida. 14, 103 Pac. 389.)

The officers of the corporation, as such, have no power to bind it by assuming to enter into obligations or contracts important and far-reaching in their effect without the direction and authorization of the board. (*Tulley v. Citizens' Bank*, 18 Ind. App. 240, 47 N. E. 850; *Grant v. Railroad Co.*, 66 Minn. 349, 69 N. W. 23; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. 479, 55 N. W. 631, 20 L. R. A. 780; *Dycus v. Traders' Bank & Trust Co.* (Tex. Civ.), 113 S. W. 329; *United States v. City Bank*, 21 How. (U. S.) 356, 16 L. ed. 130.)

To justify the acts of an agent of a corporation to enter into contracts for it, the authority by resolution is an indispensable requirement in order to make the contract binding. (*Johnson v. Sage*, 4 Ida. 758, 44 Pac. 641; *Barney v. Pforr*, 117 Cal. 987, 48 Pac. 989; *Salsfield v. Land Co.*, 94 Cal. 546, 29 Pac. 1105; *Alta Min. Co. v. Alta Placer Co.*, 78 Cal. 629, 21 Pac. 373; *Nason v. Lingle*, 143 Cal. 363, 77 Pac. 71.)

AILSHIE, J.—A motion has been made to strike from the transcript certain portions thereof on various grounds, the principal one of which is that the statement contains no enumeration of errors or specifications of the insufficiency of the evidence to sustain the decision of the trial court. The

specifications of insufficiency of evidence are to the following effect: "(1) That the evidence as a whole is insufficient upon which the decision is rendered and the judgment made and entered. (2) The evidence shows that, etc." This is followed with some five pages of recital as to what the evidence does show and which statements, if correct, would clearly show the appellant entitled to judgment in his favor, and would likewise show that the defendant was not in fact entitled to the judgment it recovered in the trial court. The objections made to these specifications fall under the provisions of sec. 4428 of the Rev. Codes. The statute provides that, "When the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matters as is necessary to explain it, and no more." It is contended by counsel for respondent that the specifications are wholly insufficient, for the reason that they fail to point out the particulars in which the evidence fails or is insufficient, and, on the contrary, purport to set out what the evidence does show. Many authorities are cited in support of this position. (*Gaffney v. Hoyt*, 2 Ida. 199, 10 Pac. 34; *Hollister v. State*, 9 Ida. 8, 71 Pac. 541; *Van Pelt v. Park*, 18 Utah, 141, 55 Pac. 381; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124; *In re Strock*, 128 Cal. 658, 61 Pac. 282; *Hughes v. Meehan*, 84 Minn. 226, 87 N. W. 769.)

It is the common practice, and that which is apparently contemplated by the statute and court rule, for the appellant to specify the particular things that he conceives it was necessary for the adverse party to prove and which he has failed to prove, and thereby call the attention of the court and the opposing counsel to the specific insufficiency of the evidence or lack of evidence in the case. That practice is very important, and essential in cases where the evidence is composed of a great many parts or circumstances, and the appellant contends that some one or more of those parts or

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some particular circumstance that was essential to the recovery is lacking. In such case it is quite important that the complaining party should point out the particular circumstance or matter that in his opinion is lacking in order to sustain the verdict and judgment.

In this case the decision clearly went against the appellant on the ground of want of authority on the part of the cashier of the bank to execute the contract in question. When reduced to the last analysis, this is in fact the only question in the case. The appellant claims that this fact was abundantly and overwhelmingly established. He has, therefore, made his specification set forth that these facts did exist and that yet the decision went against him. This is the question that is argued all the way through the briefs. Neither the opposing counsel nor the court can in any way be misled or discommoded by the method pursued in this particular case. In order for the court to determine whether or not the judgment in the case was entered in favor of the proper party, it is necessary for us first to determine what facts should have been established by the plaintiff to entitle him to recover. It is next essential for us to determine what facts have been established, and after determining these two things the court will determine whether or not there was anything lacking in order to entitle the plaintiff to recover.

Under the facts and condition of the record in this case, it would be entirely too technical for the court to sustain the motion and strike the bill of exceptions and statement from the record. The motion should be denied, and it is so ordered.

Turning now to a consideration of the case on its merits, we find that the only real question of importance to be determined is whether or not the cashier of the respondent bank had authority to execute the contract involved in this case. On the 3d day of April, 1906, the cashier of the respondent, the First National Bank of Montpelier, addressed to appellant the following communication:

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"TIM KINNEY,  
President.

E. A. BURRELL,  
Vice-President.

E. A. BURRELL,  
Cashier.

Stockholders:

Tim. Kinney,  
E. A. Burrell,  
G. G. Wright,  
L. S. Hills,  
Geo. T. Odell,  
George Romney,  
James Redman,  
H. A. Gill,  
L. B. Leverich.

No. 7381.

THE FIRST NATIONAL BANK

of Montpelier, Ida.

Montpelier, Idaho, April 3, 1906.

Mr. G. Spongborg, City.

Dear Sir: This letter is written to confirm a verbal agreement had with you yesterday, wherein we agree to rent to you the side room in our Bank building at \$40.00 per month for a term of five years from the time when we will be able to have it finished so that you can occupy it; this to include heating and supply of water, provided we are able to secure the water from the City, otherwise we will provide you with a pump. You will please indicate your acceptance on the carbon copy herewith enclosed, on the understanding that a lease in conformity with this agreement is to be made up and delivered to you when the building is ready for occupancy.

Of course, it is understood that if anything should intervene to prevent our erecting the building we now have in contemplation, this contract is of no force and effect.

Yours truly,

E. A. BURRELL,  
Cashier."

EAB/EH.

On the next day the appellant wrote on the lower left-hand corner of the letter the following: "Montpelier, Ida. 4/4-1906. Accepted. G. Spongborg."

The bank appointed E. A. Burrell, who is one of its directors, its vice-president and cashier, and James Redman, a stockholder, as a building committee, and thereafter the bank, acting through its committee, erected the bank building referred to in the foregoing communication. During the time of the construction of this building appellant was about the building frequently, as stated by some of the witnesses "every

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few days," and from time to time he made suggestions as to changes and alterations that he would like to have made in the part of the building which he had agreed to rent. Most, if not all, of these suggestions were adopted by the bank and were made by the contractor in course of its construction. This included changes in stairways, windows, ventilation, and also included the laying of some pipe in the basement, which Spongborg furnished, for the purpose of affording a drainage for a soda fountain which he contemplated placing in the basement of the building. They also left a door unpainted on which Spongborg was to have his business sign painted.

Matters went along this way from time to time for about eighteen months, and until the month of October, 1907, both appellant and respondent apparently acting on the theory that appellant either was or should be the lessee of certain rooms in the building. In October, 1907, the bank caused a lease to be drawn and presented to Spongborg for his signature. This lease was in substantial compliance with the agreement of April 3, 1906, and the understanding had between the cashier and Spongborg, with the exception of paragraph 7 of the lease, which is as follows: "7. That the lessor, The First National Bank, may terminate this lease at any time by giving the said lessee, G. Spongborg, sixty days' notice in writing." This provision was not satisfactory to the appellant, and he refused to sign the lease on that ground, and the bank, on the other hand, refused to let appellant into possession of the premises. This action followed for the purpose of procuring specific performance of the contract. Findings and judgment were entered in favor of the defendant and plaintiff appealed.

In the first place, our attention is called to the provision of sec. 5145 of the Rev. Stats. of the United States, which provides that the affairs of each national banking association shall be managed by not less than five directors, who shall be selected by the shareholders. Counsel contend that under the provisions of this statute and the decisions of the courts, construing the powers and authority of the officers of national banks, the cashier in the case at bar had no power to enter

into a contract for the leasing of the premises in question unless he was first authorized so to do by a vote of the directors of the bank.

Counsel cite *United States v. City Bank of Columbus*, 21 How. (U. S.) 356, 16 L. ed. 130, as authority for the contention that the leasing of the property of a bank is outside of and beyond the usual and ordinary business and duty of the bank cashier. The court there said:

"The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business. . . .

"Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary." (Followed in *Windsor v. Lafayette Co. Bank*, 18 Mo. App. 665.)

This may well be accepted as the general rule of law applicable in such cases. (*Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. 479; 55 N. W. 631, 20 L. R. A. 780; *Taylor v. Bank of N. Y.*, 174 N. Y. 181, 95 Am. St. 564, 66 N. E. 726, 62 L. R. A. 783.) This rule, however, is not without a great many exceptions. For instance, the cashier or other officer of the bank may act without the scope of his authority and in a matter to which he is not authorized, and yet the bank may subsequently act in such a manner with reference to the particular transaction or subject matter as to amount to a

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ratification of the unauthorized action of the cashier or other officer, or it may take such affirmative action in accepting the benefits and fruits of the transaction as to preclude it from thereafter questioning or denying the authority of the officer to act for it. It may also remain silent and inactive at a time when good faith would have impelled it to have spoken up and disclaimed the unauthorized act of its officer. In these and many other instances that might be mentioned the unauthorized action of the cashier or other officer of the bank may become, in presumption and contemplation of law, the act of the bank itself. (Zane on Banks and Banking, sec. 105; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. ed. 49.)

While it may be, and we think usually is, the ordinary practice for the cashier of the general average of banks to do the leasing of any of its extra rooms or banking-house, still as a matter of law we take it to be well settled, as indicated by the foregoing authority, that the selling or leasing of the bank property is outside of the ordinary business and duties of the cashier unless he is specially authorized so to do. For the purposes of the present case, it may be conceded, and we shall assume, that the contract of April 3, 1906, by which the cashier of the respondent bank assumed to contract for the leasing and letting of these rooms for a period of five years was outside and beyond the usual and ordinary duties and authority of the cashier. We shall, therefore, examine the facts as disclosed by the record for the purpose of ascertaining whether or not the bank authorized this contract, or if not, whether it subsequently ratified the same by any act or conduct of its board of directors. In the first place, it is testified positively by the cashier that no such authority was granted to him prior to the execution of his contract. We must therefore look to the evidence to ascertain if there was ever any acquiescence or ratification which would bind the corporation. We are clearly satisfied that all the facts and circumstances testified to and disclosed by the record tend to the inevitable conclusion that the directors of the bank were informed of this contract, and that they so acted with reference thereto as to bind the bank and to make the contract that of the bank.



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Those circumstances briefly are: Mr. Burrell was one of the five directors of the bank; he was vice-president of the bank, and he was cashier of the bank. He apparently wrote this letter and signed it in duplicate as "cashier" of the bank, mailed it to Spongborg, and on the following day its terms were accepted by Spongborg, who indorsed his acceptance on either the original or the duplicate and signed his name thereto and returned the same to the bank. This contract, with appellant's acceptance indorsed thereon, was in the possession of the cashier, and therefore in the possession of the bank, from about the 4th day of April, 1906, until the trial of this cause. This fact alone would raise the presumption that the directors had knowledge of the contract and its contents. It is the duty of the directors to examine the papers and effects of the bank and to familiarize themselves with its business and affairs. It is fair to presume that they examined this in the course of eighteen months.

The directors also appointed Burrell and Redman as the building committee. The acts of this committee in the discharge of their duties were the acts of the bank. Either the directors themselves or this building committee accepted and adopted the plans and specifications for the building and awarded the contract. After the building was under course of construction they allowed the appellant to propose from time to time changes in the plans for the particular rooms that he had agreed to lease. The committee or the board of directors accepted these suggestions and caused the changes proposed to be made and so directed their contractor. This fact alone is evidence that the building committee or the whole board of directors, one or both, recognized Spongborg as a lessee of these rooms and that when completed he would occupy them as a tenant. They would certainly not have made changes in the construction of these rooms on the mere suggestion of a stranger and one who had no interest in them. They were clearly making these changes for the benefit of a prospective tenant.

The evidence also shows that Gill, another director, had knowledge of this contract, and that Gill stated to the attorney

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for appellant about the time of the commencement of this action that the letter and contract of April 3, 1906, was in fact submitted to the board of directors. There is no evidence in the record that this letter and contract was *not* submitted to the board of directors. Mr. Burrell, the cashier, says that it was called to the attention of the board of directors but does not remember at what time this was done. He does say, however, that they finally concluded that they would not consent to it for the full five-year period without retaining to themselves the option to terminate the lease on shorter notice. On the other hand, whatever the board of directors may have said among themselves or determined upon, they never repudiated this contract or notified appellant that they would not live up to it until in October, 1907, or some eighteen months after the execution of the original contract.

Further, it appears by the testimony of the cashier himself that he had exercised full control and authority in the leasing of the bank property, that he had leased all the rooms that had been leased. He says, however, that the other tenants were renting from month to month and that this was the only lease for a term of years. He also says that he had made it his business to find tenants for all the spare rooms in the building.

It is clear to us that a majority of the directors, if not the whole board, were aware of the contract and its terms as it had been made by the cashier of the bank. All the subsequent acts of the board and each of its directors indicated approval rather than disapproval until the building was finally completed and the formal lease was drawn eighteen months after the original contract. These circumstances amount to a ratification of the original action of the cashier, whatever his authority may have been in the first place.

It was very aptly said by the supreme court of the United States in *Martin v. Webb*, *supra*, and that observation is equally apt here, that: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise

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**Points Decided.**

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reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

After viewing the whole case in the light of the legal and equitable rules applicable to such facts and circumstances as are shown, we conclude that the findings and judgment of the trial court should have been in favor of the appellant. The judgment is therefore reversed and the cause is remanded, with direction to the trial court to make findings and enter judgment in accordance with the views herein expressed. Costs awarded in favor of appellant.

Sullivan, C. J., concurs.

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(September 2, 1910.)

**M. N. FEGTLY, Respondent, v. VILLAGE BLACKSMITH  
MINING CO., Appellant.**

[111 Pac. 129.]

**PLEADING — SUFFICIENCY OF COMPLAINT — ALLEGATION OF CORPORATE  
CAPACITY.**

(Syllabus by the court.)

1. Where a complaint against a corporation alleges "that on the 10th day of October, 1907, the plaintiff and Village Blacksmith Mining Co., a corporation, through its board of directors as officers and acting for said defendant, entered into a contract with said plaintiff," etc., and in another allegation of the complaint refers to the defendant as "a corporation," held, that the allegation of the corporate existence of the defendant is sufficient to withstand the assault of a general demurrer.

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Argument for Respondent.

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2. *Miller v. Pine Mining Co.*, 3 Ida. 495, 35 Am. St. 289, 31 Pac. 803, distinguished, and question considered but not decided as to whether or not that case expresses the correct rule of law.

APPEAL from the District Court of the Seventh Judicial District, in and for the County of Owyhee. Hon. Ed. L. Bryan, Judge.

Action by the plaintiff for debt. Judgment for the plaintiff and defendant appealed. *Affirmed.*

Richards & Haga, for Appellant.

The complaint utterly fails to allege that the defendant is a corporation properly incorporated, the state of its incorporation or its principal place of business. (Citing cases embodied in opinion as cited by appellant; *Martin v. Cook*, 14 N. Y. Supp. 329; *Oesterreicher v. Sporting Times Pub. Co.*, 5 N. Y. Supp. 3; *Mechanics' Banking Assn. v. Spring Valley S. & L. C.*, 13 How. Pr. 227.)

The recital "a corporation" is so insufficient that no testimony can be based upon it. Allegations of a pleading which are not direct, but by way of recital, are insufficient and subject to demurrer. (*Holton v. Sandpoint Lumber Co.*, 7 Ida. 573, 64 Pac. 889; *Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 364; *Berry v. Dole*, 87 Minn. 471, 92 N. W. 334; *Erwin v. Central Union Tel. Co.*, 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; *Bear River etc. Mining Co.*, 4 Cal. 294; Bliss, Code Pleading, 3d ed., sec. 318; Pomeroy's Code Rem. 601.)

Pence & Tennyson, and John F. Nugent, for Respondent.

"The technicalities of pleading have been dispensed with by our code, and a plaintiff can be sent out of court only when, upon the facts pleaded, he is entitled to no relief either at law or in equity." (*Rauh v. Oliver*, 10 Ida. 3, 77 Pac. 20.)

"The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error

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or defect." (Sec. 4231, Rev. Codes; *Jackson v. Barrett*, 12 Ida. 465, 86 Pac. 270; *White v. Johnson*, 10 Ida. 438, 79 Pac. 455; *Reynolds v. Corbus*, 7 Ida. 481, 63 Pac. 884; *Chemung Mining Co. v. Hanley*, 9 Ida. 786, 77 Pac. 226; *In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28. Also citing the authorities mentioned in opinion as cited by respondent.)

AILSHIE, J.—The question to be determined in this case is the sufficiency of the allegations of the complaint. The defendant filed a general demurrer to the complaint which was overruled. The objection raised is that the complaint fails to show whether the defendant is a corporation, copartnership, joint stock company, or the nature of its existence. In the caption to the complaint the defendant is designated "Village Blacksmith Mining Co., a corporation." The only mention of the character of defendant's existence in the body of the complaint is found in paragraphs 1 and 4. Paragraph 1 contains the following: "The plaintiff complains and alleges: (1) That on the 10th day of October, 1907, the plaintiff and Village Blacksmith Mining Co., a corporation, through its board of directors as officers and acting for said defendant, entered into a contract with said plaintiff, under and by which the said plaintiff was to perform certain labor," etc. Paragraph 4 contains the following reference to defendant's existence and character: "That at the date of said contract the defendant, The Village Blacksmith Mining Co., a corporation, was the owner and reputed owner of the mining claims hereinbefore described," etc.

Counsel for appellant rely for a reversal of the judgment upon the authority of *Miller v. Pine Mining Co.*, 3 Ida. 495, 35 Am. St. 289, 31 Pac. 803, and *Jones v. Pacific Dredging Co.*, 9 Ida. 191, 72 Pac. 956, decided by this court, together with authorities from many other courts. In *Miller v. Pine Mining Co.*, the only reference to defendant's existence was in the caption of the complaint, wherein the defendant was referred to as "a corporation." The court said: "There is no allegation in the complaint that the defendant is a corporation, nor is there any statement of facts equivalent thereto.

The complaint is entirely silent upon the subject. The words 'a corporation' annexed to the name of the defendant in the title of the cause is not an allegation that defendant is a corporation, but is a mere description of the person of the defendant. . . . In all cases where suit is brought against a private corporation, it is necessary to allege its corporate character, and the complaint is fatally defective in this respect."

The complaint in the case at bar is materially different from the complaint in *Miller v. Pine Mining Co.* In paragraph 1, it is referred to as a corporation, and the language used in that connection is equivalent to saying, "which is a corporation." And again it is charged that it was "acting through its board of directors as officers." In addition to being called a corporation, it is charged that it did the acts alleged through the agency of a board of directors. A corporation is the only legal entity known to the law which acts through officers who are in law called "directors." Again, in paragraph 5 the defendant is called a corporation, and the words "which is" or "which was" are necessarily implied from the connection in which the word "corporation" is used. We think these allegations are sufficient to withstand the assault of a general demurrer. It should be remembered that it is the defendant itself which is complaining that its own identity is not sufficiently established in the complaint. To our minds this is quite a different question from what it would be if the *defendant* were complaining that it was not sufficiently advised as to the identity and existence of the *plaintiff*. *The defendant knows who or what it is; it ought to know its own identity, and it certainly cannot be greatly prejudiced by a failure to allege in detail its corporate existence and identity.*

When we turn to the further and separate answer that was filed by the defendant in this case, we find by paragraph 1 thereof the following allegation, "That the said plaintiff now is and during all the times mentioned in the complaint was the acting secretary of said defendant, and in charge of the books and records of said defendant, and as such secretary it

was the duty of said plaintiff, among other things, to truthfully and correctly record and keep the proceedings of the meetings of the board of directors and stockholders of said corporation," etc. Reference is thereupon made to the "board of directors," "president," "manager," or officers of the "said corporation" in each of the subsequent paragraphs of the answer.

We are admonished by the provisions of sec. 4231 of the Rev. Codes that, "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." In view of the admonition of the foregoing provisions of the statute, we would not feel justified in holding that the court committed error in overruling the demurrer to the complaint in this case or that it was reversible error to admit the evidence offered by the plaintiff as to the corporate existence of the defendant, and the action and conduct of its board of directors in reference to the contract and transactions involved in the action.

It has been urged by respondent in this case that the holding of this court in *Miller v. Pine Mining Co.*, *supra*, is erroneous, and not in harmony with the general trend of authority, and we have been asked to depart from the rule there enunciated. In support of respondent's contention we are cited to the following authorities: 3 Thompson on Corporations, 2d ed., sec. 3197; 3 Purdy's Beach on Corporations, sec. 994; 5 Ency. P. & P., pp. 70, 71; note to *Miller v. Pine Mining Co.* 35 Am. St. 291; *Leader Printing Co. v. Lowry*, 9 Okl. 89, 59 Pac. 245; *Los Angeles Ry. Co. v. Davies*, 146 Cal. 179, 79 Pac. 865. On the other hand, appellant cites in support of the holding of *Miller v. Pine Mining Co.* the following authorities: *Loup v. Southern R. R. Co.*, 63 Cal. 97; *People v. Cent. Pac. R. R. Co.*, 83 Cal. 398, 23 Pac. 303; *Galveston E. R. Co. v. Smith*, 81 Tex. 483, 17 S. W. 133; *Oroville & Va. R. R. Co. v. Plumas County*, 37 Cal. 360; 3 Cook on Corporations, sec. 753; 10 Cyc. 1347; Bliss on Code Pleading, secs. 246, 247; *Sun Mutual Ins. Co. v. Miss. Valley Transp. Co.*, 14 Fed. 703, 4 McCrary

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Points Decided.

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636; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 425; *State v. Chicago M. & St. P. R. R. Co.*, 4 S. D. 262, 56 Pac. 894; *Texas etc. Life Ins. Co. v. Davidge*, 51 Tex. 249.

The cases on this subject are pretty fully collated in the notes to secs. 3197 and 3198 of 3 Thompson on Corporations, 2d ed., and 10 Cyc., pp. 1347 to 1350; also in note to *Miller v. Pine Mining Co.*, 35 Am. St. 291, and note to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375.

It must be conceded that the weight of authority is against the rule announced in *Miller v. Pine Mining Co.* We do not feel called upon, however, in this case to consider or determine as to whether this court would feel bound to follow the rule announced in the Miller case. The present case is clearly distinguishable from that case, and that fact alone is sufficient for its determination.

Judgment affirmed, with costs in favor of respondent.

Sullivan, C. J., concurs.

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(September 2, 1910.)

SNAKE RIVER VALLEY IRRIGATION DISTRICT,  
Plaintiff, v. JAMES M. STEVENS, Judge, Defendant.

[110 Pac. 1033.]

TORT—FORM OF SUMMONS—JURISDICTION OF COURT.

(Syllabus by the court.)

1. An action by a land owner within an irrigation district against the district for damages on account of failure to supply water to which he was entitled is an action in tort and not on contract.

2. Where the notice contained in a summons is given under the provisions of subd. 4, sec. 4140, instead of under the provisions of subd. 5 of that section, and notifies the defendant that if it fails to appear the plaintiff "will take judgment for the sum demanded in the complaint," naming it, instead of notifying the defendant



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Argument for Defendant.

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that the "plaintiff will apply to the court for the relief demanded in the complaint," and the plaintiff applies to the court for the relief demanded instead of taking a default judgment by the clerk, the error or mistake is not fatal to the jurisdiction of the court.

Original proceeding for a writ of prohibition. Alternative writ quashed, writ denied, and action dismissed.

O. E. McCutcheon, for Petitioner.

The notice in the summons follows the fourth subdivision of sec. 4140 of the code, which relates wholly to actions arising under contract. The fifth subdivision covers all other cases, and necessarily covers this case.

The code is mandatory on this point, and this defect is fatal. (*Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25; *Smith v. Aurich*, 6 Colo. 388; *Atchison etc. R. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Chamberlain v. Mensing*, 47 Fed. 202; *Sidwell v. Schumacher*, 99 Ill. 433.)

As to the contention of the plaintiff in the court below that this action may be treated as on an implied contract, it has been frequently held that the authority of the clerk must be strictly construed. (23 Cyc. 758, note 20.)

"Contract," strictly construed, must mean an actual contract. An implied or *quasi* contract is not a contract. (*Inhabitants of Town of Milford v. Commonwealth*, 144 Mass. 64, 10 N. E. 516.)

An irrigation district is a public corporation. (*In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. 106, 28 Pac. 272, 14 L. R. A. 755.)

A public offense is not a contract. (2 Words and Phrases, p. 1527.)

John W. Jones, for Defendant.

The action pleaded in plaintiff's complaint is an action *ex contractu*, and consequently the summons is in all respects in conformity with the statutory requirements, and even if it were conceded to be erroneous in the particular specified in

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the defendant's motion to quash, yet the summons having had attached to it a copy of the complaint in the action, this error affected in no wise any substantial right of the defendant, and the motion to quash was properly overruled.

The failure to deliver the requisite water to the plaintiff by the defendant irrigation district was a failure to discharge its agreement, which is solely a breach of contract. (*Rocky Ford etc. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638; 1 Thompson, Corp., sec. 940.)

The later and better considered decisions of the courts are uniform in holding that it is entirely immaterial whether the summons is under the fourth or fifth subdivision of the section, when a copy of the complaint is served with the summons. (*Berry v. Bingaman*, 1 S. D. 525, 47 N. W. 825; *McCoun v. New York, C. & H. R. R. Co.*, 50 N. Y. 176; *Hill v. Morgan*, 9 Ida. 718, 76 Pac. 323; *Granger v. Sheriff*, 133 Cal. 416, 65 Pac. 873; *Harpold v. Doyle*, 16 Ida. 671, 102 Pac. 158.)

AILSHIE, J.—This is an application for a writ of prohibition. The complaint alleges that the trial court is about to proceed to hear the evidence and render judgment in the case of Frank Stern, Plaintiff, vs. Snake River Valley Irrigation District, Defendant, now pending in the district court of the sixth judicial district in and for the county of Bingham. This writ is sought to restrain the judge from proceeding with the case on the ground that he has no jurisdiction to hear and determine the same.

The case of *Stern v. Snake River Valley Irrigation District* was instituted in the district court, and it was alleged in the complaint that the defendant irrigation district is a public or quasi-municipal corporation organized under the irrigation district law of this state, and that the plaintiff owns land situated within the district which is entitled to receive water from the district canals. The plaintiff thereupon alleged that the district wrongfully and unlawfully refused and neglected to furnish or deliver water for his land during the irrigation season of 1909, and that he accordingly suffered

loss and damage in the aggregate sum of \$2,041.81, and prayed for judgment accordingly. Summons was issued in due form, with the exception that plaintiff in this court contends that instead of the notice being in conformity with the provisions of subd. 5, sec. 4140, it was made to conform with subd. 4 of that section. Sec. 4140 provides in part as follows: "The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain: . . . 4th. In an action arising on contract for the recovery of money or damages only, a notice that unless the defendant so appears and answers the plaintiff will take judgment for the sum demanded in the complaint; 5th. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint. The name of the plaintiff's attorney, with his postoffice address or residence must be indorsed on the summons."

In this case the portion of the summons to which objection is made reads as follows: "And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for the sum of \$2,040.81, with interest thereon from September 15, 1909, at seven per cent per annum, and costs of suit." This is what is ordinarily called a demand summons. Counsel for defendant made a special appearance in the district court and moved to quash and set aside the summons and service thereof on the grounds that it did not comply with the statute. The court overruled the motion and the defendant refused to appear further, and now alleges that the court threatens to proceed to hear the evidence and render judgment in the case. The irrigation district now insists that the court has no jurisdiction to further proceed and that such a summons utterly fails to confer jurisdiction.

Counsel for the defendant judge argues that this is in fact an action *ex contractu*, that the relation existing between the land owner in the irrigation district and the district itself is that of an implied contract. Counsel relies for support of this contention on the *Rocky Ford Canal, B. L. L. & T. Co.*

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*v. Simpson*, 5 Colo. App. 30, 36 Pac. 638, and 1 Thompson on Corporations, sec. 940. These authorities have reference to private corporations as distinguished from public or municipal corporations.

The liability in this case, if any liability has been incurred by the district, sounds in tort and arises by operation of law rather than out of contract. There is no greater contractual relation existing between the person who is entitled to receive water from the canal of the district and the district itself than there is between the resident taxpayer of the county and the county as a municipal government. It is true that it has been said by text-writers that there is an implied contractual relation arising out of the reciprocal duties and obligations in all cases of public corporations (see "Laws as Contracts," by Pliny T. Sexton, delivered at Albany Law School, June, 1910), but there is no such contractual relation as is contemplated by sec. 4140 of our code. This was clearly an action in tort, and the summons should have been issued in conformity with the provisions of subd. 5 of sec. 4140.

The real question to be determined is: Was the error or mistake fatal to the jurisdiction of the court? The summons should have notified the defendant that in case it failed to appear and answer, the plaintiff would "apply to the court for the relief demanded in the complaint." Then in case of failure to appear and answer under the provisions of sec. 4360, the clerk would have entered the defendant's default for failure to appear and answer, and thereafter the plaintiff would have applied to the court for the relief demanded and have submitted his proofs in accordance with the requirements of the statute. It is not contended at this time that the clerk has attempted to enter a default judgment or intends to do so. On the contrary, the petition shows "that the said district court proposes and intends to proceed in said suit against your petitioner," and that the court will proceed to final judgment in the case unless restrained by writ of prohibition. Subds. 4 and 5 of sec. 4140 prescribe the form of notice that shall be contained in a summons in the respec-

tive classes of cases, and are in harmony with the requirements of subds. 1 and 2 of sec. 4360, providing for the entry of judgment in cases where the defendant fails to appear and answer. In the one class where the action arises out of contract, the plaintiff gives notice that if defendant fails to appear and answer he will take judgment for the amount specified, and in case of failure to answer, the clerk is authorized to enter a judgment according to the notice in the summons and prayer of the complaint. In the other class of cases, the summons notifies the defendant that if he fails to appear and answer, the plaintiff will apply to the court for the relief demanded, and subd. 2 of sec. 4360 provides that in all such cases the plaintiff shall make application to the court and submit his proofs, and he will thereupon obtain such judgment as his proofs entitle him to. Where, however, a plaintiff does in fact apply to the court in conformity with the provisions of subd. 2 of sec. 4360, we do not think the jurisdiction of the court fails simply because the summons happened to state that the plaintiff would "take judgment for the sum demanded in the complaint" instead of saying that "the plaintiff will apply to the court for the relief demanded in the complaint."

It must be remembered that this is a question not of error but of jurisdiction. We are not in this case called upon to determine whether or not it was error for the court to overrule and deny the defendant's motion to quash the summons. We do hold, however, that whatever error the court may have committed in his ruling on the motion it did not oust him of jurisdiction to proceed with the case.

A number of authorities have been called to our attention, some of which are in point while others are not applicable under our statute. In *Harpold v. Doyle*, 16 Ida. 671, 102 Pac. 158, this court held that a summons in a divorce case which contained the notice that if the defendant failed to appear and answer the plaintiff "will take judgment," etc., was not fatal to the jurisdiction although it was a case wherein the summons should have notified the defendant that the plaintiff "will apply to the court for the relief demanded

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in the complaint." In support of this holding, the court cited *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375, in which it was held by the California court that a summons which notified the defendant that "plaintiff will take judgment," etc., was equivalent to a notice that "he would apply to the court for the relief demanded."

*Clark v. Palmer* has been cited, approved and followed by the supreme court of California in *People v. Dodge*, 104 Cal. 491, 38 Pac. 203. In the latter case the court pointed out the distinction between a *voidable* summons and a *void* summons, and held that an error in incorporating the proper notice in the summons, though voidable, was not void so as to oust the jurisdiction.

In *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456, the supreme court of Montana held that a summons in an action for tort which notified the defendant that should he fail to appear and answer, plaintiff would take judgment against him for the sum of \$150 and costs of suit was not sufficient under the Montana statute, but that the notice should have been given under the other subdivision of the statute to the effect that the plaintiff would apply to the court for the relief demanded. Sec. 68 of the Montana Code of Civil Procedure, which was considered in that case, seems to be identical with the provisions of our statute as found in sec. 4140. In *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25, the same court again had this statute under consideration, and held that where the summons notified the defendant that plaintiff would apply to the court for the relief demanded instead of stating that he would take judgment for the specified sum, the error was not fatal, and that the defendant might apply to the court instead of the clerk, and the court would have jurisdiction to hear his proofs and render judgment. In the latter case Justice De Witt filed a very strong dissenting opinion in which he insisted that the summons was void.

The adjudicated cases on this question are not in harmony. This, perhaps, is more largely due to the wording of the various statutes than to any other cause. In some of the cases cited it has been suggested that if a copy of the complaint

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Points Decided.

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was served with the summons, that fact would aid the summons and tend to cure the defect in the notice. We utterly fail to see the force of this logic. If the defect consisted in a failure to sufficiently state the *nature* and *character* of the cause of action, then it must appear at once that service of a copy of the complaint would cure that defect, but where the defect consists in a failure to give the proper *notice* as to whether the plaintiff would take judgment as prayed for or would apply to the court for the relief demanded, we fail to see how a service of a copy of the complaint would aid or improve the summons in that respect.

As above stated, it does not seem to us that the defect in the summons under consideration goes to the jurisdiction of the court, and if the plaintiff in fact does apply to the court instead of taking a default judgment, we do not see wherein the defendant can suffer any substantial prejudice.

The alternative writ is quashed and the writ prayed for is denied, and the action will be dismissed. Costs awarded to the defendant.

Sullivan, C. J., concurs.

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(September 19, 1910.)

FRED B. DANIELS, Appellant, v. FRANK ENGLEHART,  
Respondent.

[111 Pac. 3.]

PROMISSORY NOTE—FAILURE OF CONSIDERATION—DEFENSE—RESCISSION  
AND DAMAGES.

(Syllabus by the court.)

1. The maker of a promissory note cannot avoid payment of the same on the grounds of failure of consideration, where the answer and proofs admit that there was not a total failure of consideration and that he in fact received and retains a part of the consideration as the same was agreed upon.

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Argument for Respondent.

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2. Where there has been a partial failure of consideration for the execution of a promissory note, the maker of the note, in order to obtain relief, must either rescind the contract and return the consideration received or claim damages for breach of the contract or pursue some remedy whereby the holder of the note may be enabled to receive just compensation for such part of the consideration as actually passed.

APPEAL from the District Court of the Fourth Judicial District, in and for Elmore County. Hon. Edward A. Walters, Judge.

Action on promissory note. Judgment for defendant. Plaintiff appealed. *Reversed.*

E. M. Wolfe, for Appellant.

The failure of the defendant to set up in his answer either a rescission of the contract or an offer to return the water right puts it beyond him to refuse the payment of the note. (*Cowen v. Harrington*, 5 Ida. 329, 48 Pac. 1059; *Caldwell v. Ruddy*, 2 Ida. 5 (1), 1 Pac. 339.)

Plaintiff having purchased the note before maturity, and for value, even though he was an officer of the company from which he purchased it, and knew that the note was given for a water right, that fact alone would not bar him from the right to recover, and would not change his position as a *bona fide* purchaser, unless he knew that the company had defaulted before his purchase of the note. (*United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. 752, 62 Pac. 751; *Siegel v. Chicago Trust & Savings Bank*, 131 Ill. 569, 19 Am. St. 51, 23 N. E. 417, 7 L. R. A. 537; 1 Beach, Private Corp., sec. 245.)

J. G. Watts, for Respondent.

It cannot be contended that the appellant herein took this note in good faith. The evidence shows almost an entire failure of consideration. It further shows that the respondent cannot rescind and be restored to his original rights by the return of his money, for the reason that he has exhausted



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through this deal his right with the government for a desert entry, that he has made large improvements on the land which cannot be recovered in an action for damages, the property of the Great Western being in the hands of a receiver. (Secs. 3485, 3509, 3515, Rev. Codes.)

AILSHIE, J.—This is an action on a promissory note. Plaintiff alleged that he was a *bona fide* purchaser of the note prior to maturity. Defendant answered admitting the execution of the note and that the same had not been paid, but denied that the plaintiff was a *bona fide* holder of the note by indorsement prior to maturity thereof.

The defendant also alleged as a defense that the note was executed as part payment for a water right from the Great Western Beet Sugar Co., and that the company promised and agreed to construct reservoirs, canals and ditches and furnish the defendant with water for his tract of land, comprising 160 acres, which constituted the consideration for the note sued upon. It was also alleged in the answer that the plaintiff was vice-president and agent of the Great Western Beet Sugar Co. at the time the contract was made and the note was executed, and that he had full knowledge of the consideration and the terms of the agreement entered into.

The defendant by way of showing failure of consideration alleged in paragraph 9 of his answer as follows:

“That said ditch was not completed as agreed by the said Great Western Beet Sugar Company on the 31st day of May, 1907, and is not now completed of sufficient capacity to deliver water to this defendant and others entitled to water under said ditch, and that water was not delivered to the land of defendant prior to the 31st day of May, 1908, and has not yet been delivered to said defendant in any sufficient quantity to water said land, or in any quantity whatever more than sufficient to water one and one-half acres as above stated.”

The plaintiff moved for judgment on the pleadings and this motion was predicated on the theory that the answer did not show a failure of consideration, and that under the authority

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of *Cowen v. Harrington*, 5 Ida. 329, 48 Pac. 1059, and *Caldwell v. Ruddy*, 2 Ida. 5, 1 Pac. 339, the defendant could not successfully defend on the ground of want of consideration where his answer showed on its face that a part consideration had in fact been received and that there had not been a total failure of consideration, and that defendant had not returned the water contract and consideration received and had never attempted to rescind the contract and set up no claim by way of cross-complaint or otherwise for damages for breach of the contract. Under the authority of *Cowen v. Harrington* and *Caldwell v. Ruddy*, *supra*, the answer was not sufficient to defeat plaintiff's recovery on the grounds of failure of consideration.

A party cannot execute his promissory note and let the matter run until after its maturity and suit is brought on it, and then successfully defend on the ground of want of consideration, where he himself admits that there was not a total failure of consideration and that he in fact received a part of the consideration. He certainly has a remedy unless the note has passed into the hands of an innocent third party, and in this case the evidence was sufficient from which to conclude that plaintiff was not an innocent holder of the note. But the maker of the note cannot retain such consideration as he has received and at the same time successfully resist the payment of the obligation. He must either rescind or seek damages for breach of the contract, or pursue some other remedy which will permit the party to whom the obligation is due to receive such compensation as is justly due him under the contract or have a return of the consideration.

The judgment is *reversed* and the cause is remanded, with direction to the trial court to permit the defendant to amend his answer or to file a cross-complaint if he sees fit so to do. Judgment *reversed*, with costs in favor of appellant.

Sullivan, C. J., concurs.

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Points Decided.

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(September 22, 1910.)

C. E. B. ROBERTS et al., Appellants, v. PAUL R. KARTZKE et al., Respondents.

[111 Pac. 1.]

PRIMARY ELECTION—CANVASSING BOARD — INJUNCTION — DISCRETION OF COURT—RESTRAINING ACT ALREADY DONE—ORDER DENYING INJUNCTION—APPEAL FROM.

(Syllabus by the court.)

1. Under the provisions of sec. 4287, Rev. Codes, an injunction is a writ or order requiring a person to refrain from doing a particular act.

2. Where an appeal is taken from an order denying an application for a temporary restraining order, made upon the complaint alone, without notice to the adverse party, to restrain a canvassing board from canvassing the vote of a certain precinct in a county, and a motion is made to dismiss the appeal based upon the affidavit of the clerk of the canvassing board, showing that such board had canvassed and certified the abstract of votes of such county and precinct prior to the taking of the appeal, the motion will be granted and the appeal dismissed.

3. The granting of an injunction is a matter of judicial discretion, and the granting of a preliminary restraining order *ex parte* rests still more largely in the discretion of the court or judge.

4. The judge or court should not grant a temporary restraining order upon the verified complaint alone in an action of great public importance where the party to be affected thereby can be readily notified, except in case of extreme emergency, as a hasty and improvident granting of temporary injunctions, without notice, is not in accord with the fair and orderly administration of justice.

5. An appeal from an order denying an application for a temporary restraining order does not operate as a supersedeas of the order appealed from, and at the same time in effect grant the restraining order pending the appeal.

APPEAL from the District Court of the Fourth Judicial District, for Lincoln County. Hon. E. A. Walters, Judge.

Action to enjoin the canvassing board from canvassing and certifying an abstract of the vote in Hillsdale precinct, Lincoln county. Application denied. *Affirmed.*

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Argument for Respondents.

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W. G. Bissell, W. T. Stafford, T. E. Bennett, Sutphen & Sutphen, R. R. Cook, D. W. Zent, and E. R. Dampier, for Appellants.

This proceeding was not an application for injunction without notice, but was an application for a temporary injunction merely, and that before granting the injunction a hearing might be had at a time and place designated where each party should have ample opportunity to be heard.

Courts of equity may restrain boards of commissioners from canvassing and counting the result of elections held without authority of law. (*State v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *Gossard v. Vaught*, 10 Kan. 162; *State v. Marion County Commr.*, 21 Kan. 437; *Bradley v. Canvassers*, 154 Mich. 274, 117 N. W. 649; *People v. Tool*, 35 Colo. 225, 117 Am. St. 198, 86 Pac. 224, 6 L. R. A., N. S., 822.)

Appellant contends that while the statute fails to provide the remedy, that there is a remedy; that the court is authorized under the state constitution to read into the law the mandatory and self-enacting provision of sec. 18, art. 1 of the Bill of Rights, and grant the injunction asked for in the court below, by reversing and remanding the order with direction to the lower court that the temporary injunction be issued, a time and place fixed for the hearing of the cause as prayed for in appellant's original complaint and application.

Frank T. Disney, County Attorney, Paul S. Haddock, J. R. Bothwell, Harlan D. Heist, and Victor O. Johnson, for Respondents.

An injunction will not issue to restrain a commission of an act already performed. (*Wilson v. City of Boise*, 7 Ida. 69, 60 Pac. 84; 2 High on Injunctions, sec. 1701a; *Gallagher v. Schneider*, 110 Ga. 322, 35 S. E. 321; *Ambos v. Savannah, T. & I. O. H. Ry.*, 113 Ga. 1012, 39 S. E. 477; *McKinney v. County Commrs.* (Fla.), 3 So. 887; *Delger v. Johnson*, 44 Cal. 182; *People v. Clark*, 70 N. Y. 518; *People v. Common Council*, 82 N. Y. 575; *In re Manning*, 139 N. Y. 446, 34 N. E. 931.)

The granting of any injunction is largely a matter of judicial discretion. The granting of a *preliminary* injunction

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rests still more largely in the discretion of the court. (22 Cyc. 749.)

“The granting of a preliminary injunction resting in the sound discretion of the court, the appellate court will not disturb the same where there is no abuse of discretion.” (*Washington & Idaho Ry. Co. v. Coeur d’Alene Ry. & Nav. Co.*, 2 Ida. 439, 17 Pac. 142; *Shields v. Johnson*, 10 Ida. 454, 79 Pac. 394; *Weber v. Della Mt. Min. Co.*, 11 Ida. 265, 81 Pac. 931.)

“A court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency.” (*Atchison etc. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; 10 Am. Digest (Dec. ed.), sec. 143, subd. h; *McGregor v. Case*, 80 Minn. 214, 83 N. W. 140.)

SULLIVAN, C. J.—This is an appeal from an order denying an application for a temporary injunction *pendente lite*. The action was brought to restrain the board of county commissioners of Lincoln county, acting as a canvassing board, from canvassing the votes cast in Hillsdale precinct of said county at the primary election held on August 30, 1910.

The principal allegation on which the action is based is to the effect that the voting place in said precinct, as designated by the board of county commissioners, was at the schoolhouse in School District No. 34, and that the election was held at the schoolhouse in School District No. 37, eight and one-half miles distant from the schoolhouse in said District No. 34, and counsel contend for that reason the vote cast in said precinct was absolutely void and that the board of canvassers had no authority in law to count and certify the same under the provisions of sec. 448, Rev. Codes, or sec. 37 of the primary election law.

The application for the writ was made without notice, upon an *ex parte* application. The judge denied said application and the order denying the same is assigned as error.

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When the case was reached for hearing in this court, respondents moved to dismiss the appeal on the ground that the act of the board of canvassers sought to be enjoined had been done and performed prior to the filing or service of any notice of appeal from the order denying said application.

In support of said motion, there was presented the affidavit of the clerk of the board of said county commissioners, to the effect that said board completed the canvass of all of the votes cast in said county and in said Hillsdale precinct, and had completed the abstracts thereof on the 8th day of September, 1910, and had certified them to the Secretary of State, which abstracts included the votes from said Hillsdale precinct as well as all other precincts in said county, and that said abstracts were on file in the proper office and that said canvassing board adjourned on said date *sine die*; that no notice of the appeal was served upon the clerk of said board until 1:35 P. M. on the 9th day of September, 1910, and after said abstracts had been certified and the canvassing board had adjourned *sine die*.

An injunction is defined by sec. 4287, Rev. Codes, as follows: "An injunction is a writ or order requiring a person to refrain from a particular act." In *Wilson v. Boise City*, 7 Ida. 69, 60 Pac. 84, this court held that a writ of injunction would not be issued to restrain an act already done. In the case at bar the judge denied the application and no stay of proceedings was had pending the appeal.

In vol. 2, High on Injunctions, sec. 1701a, it is said: "Where an appeal is taken from an order dissolving or denying a preliminary injunction or dismissing the bill, and, pending the appeal, the act sought to be restrained has been accomplished, that fact, upon being brought to the attention of the reviewing court by motion supported by affidavit affords sufficient ground for dismissing the appeal, the dismissal being without prejudice." (*Gallaher v. Schneider*, 110 Ga. 322, 35 S. E. 321; *Ambos v. Savannah T. & I. O. H. Ry.*, 113 Ga. 1012, 39 S. E. 477.) In the last-cited case, the syllabus is as follows: "It appearing to this court that, since the refusal of the application for temporary injunction by

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the court below, the defendant has done all the acts sought to be enjoined, no supersedeas having been granted, the writ of error is dismissed without prejudice. This case is controlled by the decision in *Gallagher v. Schneider*, 110 Ga. 322, 35 S. E. 321."

The act sought to be enjoined in the case at bar had been performed and under the authority of the case of *Wilson v. Boise City*, *supra*, the motion to dismiss must be granted.

*Application Made Without Notice to Adverse Party.*

The order appealed from was made upon an *ex parte* application for a restraining order *pendente lite*, and upon a careful examination of the complaint, this court is unable to say that the judge abused his discretion in denying said application. This conclusion is reached without deciding whether or not a restraining order will lie in such a case as the one at bar.

It is a well-recognized rule that the granting of an injunction is a matter of judicial discretion, and the granting of a preliminary restraining order, *ex parte*, rests still more largely in the discretion of the court. Where an application is made on the complaint alone as in the case at bar, and without notice to the adverse party, where the court knows of his own knowledge that notice may readily be given, and has the authority to interrogate the applicant or his attorney as to the facts stated in the complaint and may consider such information in passing upon the application for a temporary restraining order, the granting of such a restraining order rests more largely in the discretion of the court than an application made upon notice.

This court held in *Washington & I. Ry. Co. v. Coeur d'Alene Ry. & Nav. Co.*, 2 Ida. 439, 17 Pac. 142, that the granting of a preliminary injunction rests in the sound discretion of the court, and that the appellate court will not disturb the action of the trial court where no abuse of discretion appears. (*Shields v. Johnson*, 10 Ida. 454, 79 Pac. 394; *Weber v. Della Mt. Min. Co.*, 11 Ida. 265, 81 Pac. 931.)

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Opinion of the Court—Sullivan, C. J.

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In *Atch. etc. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596, it is said in the syllabus: "Therefore, the court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions without notice is not in accordance with a fair and orderly administration of justice." (10 Am. Dec. Digest, sec. 134, subd. h.)

In *McGregor v. Case*, 80 Minn. 214, 83 N. W. 140, it was held that an order refusing a temporary injunction which rested solely on the complaint may be the subject of judicial discretion, although the complaint on its face clearly authorizes the relief sought and warrants the issuance of the injunction. And it was there held that the court did not abuse its discretion in refusing an injunction based upon the complaint. (22 Cyc. 924.)

It is intimated that since appellant has taken all the steps prescribed by the statute to perfect his appeal, that the taking of such appeal ought to and does have the force and effect of a restraining order such as the trial court denied pending the appeal. This is an absurd contention, for the reason that the appellant would thus secure by taking his appeal just what the trial judge refused to give him. Had the trial judge granted an injunction and thereafter on motion dissolved the same, and an appeal been taken from the order of dissolution, the judge might in the meantime, had he seen fit to do so, have suspended the order of dissolution pending the appeal. But in the case at bar, a restraining order was denied, and we know of no principle of law in such a case that would permit the appellant, in effect, to reverse the order of the judge pending an appeal simply by taking an appeal. An appeal from an order denying an application for an injunction does not operate as a supersedeas of the order appealed from and at the same time grant a temporary injunction *pendente lite*. It must be borne in mind in this case that a restraining order had been denied.



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Points Decided.

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The appeal is dismissed and costs awarded in favor of respondents.

AILSHIE, J., Concurring.—I am not prepared to say that the appeal should be dismissed in every case where it appears that the act sought to be enjoined has been committed either before the taking of the appeal or before the hearing in the appellate court. I do agree, however, that where the act is purely and solely ministerial, as it was in *Wilson v. Boise City*, 7 Ida. 69, 60 Pac. 84, and is in this case, the appeal should be dismissed. Under such circumstances the appeal becomes purely a moot case—it will require some other remedy to afford any ultimate relief.

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(September 30, 1910.)

HIRAM G. FULLER, Plaintiff, v. IRA N. COREY, County Auditor, Defendant.

[110 Pac. 1035.]

PRIMARY NOMINATION—FILING EXPENSE ACCOUNT—FAILURE TO COMPLY WITH SECTIONS 25 AND 26 OF PRIMARY NOMINATION STATUTE.

(Syllabus by the court.)

1. Where a candidate for nomination under the direct primary nomination statute of this state has been duly and regularly certified by the canvassing board to the county auditor as having received the nomination of his party for a county office, the duty of causing the name of such nominee to be printed on the official ballot to be used at the succeeding general election is purely a ministerial act, and the auditor cannot sit in judgment on the candidate and adjudge him ineligible to have his name printed on the ticket on account of his failure to file an expense account either within the time or in the manner provided by the direct primary law. (Secs. 25 and 26, 1909 Sess. Laws, p. 204.)

2. Before a nominee under the direct primary law can be denied the right to have his name printed on the official ballot on account of ineligibility resulting from his failure to file a statement of his expense account either within the time or in the manner provided.

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by law, he must be judicially declared, by orderly and due process of law, to be ineligible on account of his violation of the direct primary law.

Original application for writ of mandate. Petition granted and order entered that peremptory writ issue.

A. H. McConnell, for Plaintiff.

O. P. Soule, for Defendant.

Counsel file no briefs.

**AILSHIE, J.**—This is an application for a writ of mandate against the auditor of Fremont county, compelling him to cause the name of petitioner, Hiram G. Fuller, to be printed on the official ballot as the Republican candidate for county treasurer of Fremont county to be voted on at the general election in November.

It is alleged by the petitioner that he was duly and regularly nominated by the Republican party at the primary election held in August as the nominee of that party for the office of county treasurer. It is further alleged that the county auditor refuses to have the petitioner's name printed on the official ballot, for the reason that petitioner did not file his expense account as required by secs. 25 and 26 of the primary election law (1909 Sess. Laws, pp. 204 and 205), within ten days after the date on which the primary election was held.

Sec. 25 of the act provides that every candidate for nomination under the terms of the act shall not more than ten days after holding the primary election file an itemized statement in writing, duly sworn to as to its correctness, setting forth the items of expenditures made by him for the purpose of securing or influencing or in any way affecting his nomination. Sec. 26 of the act provides that any candidate who shall fail, neglect or refuse to file with the proper officer the statement provided for by sec. 25, within the time provided therein, or to fully set out in detail the sums expended by him, etc., shall be guilty of a misdemeanor, and then pre-

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Opinion of the Court—Ailshie, J.

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scribes the penalties, among which is that of ineligibility to become a candidate for the office to which he was nominated.

The only question with which we have to deal at this time is that of the power of the county auditor to refuse to have the name of a candidate printed on the official ballot where he has been declared by the canvassing board to be the nominee of his party. On this question there can be but little doubt. The duty of the auditor is purely ministerial; he is vested with no judicial powers or functions in the matter. He cannot sit in judgment on the candidate and without a hearing declare him guilty of a misdemeanor and inflict the penalties. (*Miller v. Davenport*, 8 Ida. 593, 70 Pac. 610.) It is clearly the duty of the auditor to perform the duties required of him by law, and until the candidate has been judicially declared ineligible to have his name placed upon the ticket, the auditor has but one duty to perform, and that is to cause the candidate's name to be printed on the official ballot along with all the other nominees for the respective offices. If the candidate has violated the law and is subject to its penalties, that must be determined in the orderly and due process of law.

A peremptory writ of mandate will issue to Ira N. Corey, auditor of Fremont county, directing him to place the name of the petitioner, Hiram G. Fuller, on the official ballot as the Republican nominee for the office of county treasurer to be voted upon at the ensuing general election. Costs awarded in favor of plaintiff.

Sullivan, C. J., concurs.

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Argument for Petitioner.

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(September 30, 1910.)

In the Matter of the Application of JOSEPH CHASE for  
a Writ of Habeas Corpus.

[110 Pac. 1036.]

**HABEAS CORPUS—CONVICTION—SENTENCE—EXCESSIVE PUNISHMENT—  
VOID SENTENCE—VOIDABLE.**

(Syllabus by the court.)

1. Under the provisions of sec. 8 of the act known as the Indeterminate Sentence Law, approved March 11, 1909 (Sess. Laws 1909, p. 81), a person convicted of a felony committed prior to the taking effect of that act and sentenced after the act was in force, must be sentenced under the law in force at the time such felony was committed.

2. *Held*, that the petitioner should have been sentenced under the provisions of sec. 6768, Rev. Codes, by which the minimum sentence was fixed at five years and the maximum extended to life.

3. *Held*, that the sentence imposed is not void *ab initio*, but is valid and certain as to the term of five years' imprisonment, and that the prisoner cannot be discharged on *habeas corpus* until he has performed so much of the sentence as was within the power of the court to impose.

4. *Ex parte Cox*, 3 Ida. 530, 95 Am. St. 29, 32 Pac. 197, commented on and distinguished.

Original application for a writ of *habeas corpus* to discharge the prisoner from custody on the ground that the trial court had no jurisdiction to pronounce the sentence that was imposed on the applicant. *Application denied.*

Chas. Clifton, and J. Nat. Hudson, for Petitioner.

The sentence must be definite and certain as regards the time of its duration. (Rev. Codes, sec. 6307.)

The prisoner should have been sentenced under that law, as provided in the act of March 11, 1909, Sess. Laws, 1909, p. 85, instead of receiving an indeterminate sentence under said act.

The Idaho law of March 11, 1909, is "borrowed" from the Kansas law. (Gen. Stat. Kansas, 1909, pp. 1462, 1463.)

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Argument for State.

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This law, generally known as the indeterminate sentence law, has been, by the supreme court of Kansas, held in three separate particulars to be *ex post facto* and void as to crimes committed before it went into effect. (*State v. Tyree*, 70 Kan. 203, 78 Pac. 525, 3 Ann. Cas. 1020. See, also, *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 149; *Ex parte Cox*, 3 Ida. 530, 95 Am. St. 29, 32 Pac. 197, and authorities there cited.)

The excess of jurisdiction to render the particular judgment makes the judgment void, and the prisoner should be discharged on *habeas corpus*. (*In re Lucas*, 17 Ida. 164, 104 Pac. 657; *In re Walton*, 17 Ida. 171, 104 Pac. 659; *Geyger v. Stoy*, 1 Dall. (Pa.) 135, 1 L. ed. 70; *In re Taylor*, 7 S. D. 382, 58 Am. St. 843, 64 N. W. 253, 45 L. R. A. 136.)

K. I. Perky, and D. E. Brinck, *Amici Curiae*.

It cannot be urged that the sentence is void for uncertainty. It is at least definite and certain as to the minimum term expressed; and indeterminate sentences are upheld wherever the question of uncertainty has been raised. (12 Cyc. 955; *Ex parte Brown*, 39 Wash. 160, 109 Am. St. 868, 81 Pac. 552; 1 L. R. A., N. S., 540, 4 Ann. Cas. 488; *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; *Murphy v. Commonwealth*, 172 Mass. 264, 70 Am. St. 266, 52 N. E. 505, 43 L. R. A. 154.)

Uncertainty in the sentence, being mere error, will not alone justify discharge on *habeas corpus*. (*Ex parte Walker*, 132 Cal. 143, 64 Pac. 135; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393.)

D. C. McDougall, Attorney General, O. M. Van Duyn, and J. H. Peterson, Assistants, for State.

While such sentence may be void in part, to wit, to an extent beyond the minimum sentence of five years, yet it will hold good until the five year sentence is completed, and a writ of *habeas corpus* sought to be brought before that time is premature. (12 Cyc. 782, subd. 7.)

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This sentence is not uncertain as to the minimum length. No indeterminateness exists until at least that period is passed. (*Martin v. District Court*, 37 Colo. 110, 119 Am. St. 262, 86 Pac. 82.)

Where a judgment is merely excessive and the court which pronounces it is a court of general jurisdiction, it is not void *ab initio* because of excess, but is good so far as the power of the court extends, and is invalid only after the excess, and therefore, a person in custody under such sentence cannot be discharged on *habeas corpus* until he has suffered or performed so much of it as it is within the power of the court to impose. (*United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. ed. 631; *In re Graham*, 74 Wis. 450, 17 Am. St. 174, 43 N. W. 148; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. 363, 34 L. ed. 1051; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; 15 Am. & Eng. Ency. Law, 2d ed., 171, and authorities cited.)

SULLIVAN, C. J.—This is an original application to this court for a writ of *habeas corpus* for the release of the applicant, Joseph Chase, who, it is alleged, is unlawfully imprisoned and restrained of his liberty by John W. Snook, the warden of the state penitentiary.

It is alleged in the petition that said imprisonment and restraint are illegal, and that the illegality consists in the fact that the said Chase was on the 9th day of November, 1909, in the district court of Bingham county, convicted of the crime of rape, committed on or about the 1st day of January, 1909, and thereupon sentenced by the judge of said court to be imprisoned for a term of from five to fifteen years in the state penitentiary; that said term of imprisonment is indefinite and uncertain, and was imposed under and by virtue of the law of the state of Idaho which took effect on the 6th day of May, 1909, known as the indeterminate sentence law (Sess. Laws 1909, p. 82), and long after the commission of the crime for which said Chase was sentenced, and it is contended that said court should have sentenced said Chase under the law in force when said crime was committed, to wit, under the provisions of sec. 6768, Rev. Codes.

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The above-stated facts in regard to the conviction and sentence of the defendant are admitted by the return of the warden and conceded by counsel for the state. Sec. 8 of the said act known as the indeterminate sentence law provides, among other things, that persons convicted of a felony prior to the taking effect of said act and sentenced after said act went into force, should be sentenced under the law in force at the time the felony was committed. Therefore, it is clear that the court committed an error in sentencing said applicant under that act.

Under the provisions of sec. 6768, Rev. Codes, the plaintiff could not have been sentenced for a less term than five years. Sec. 1 of said indeterminate sentence law provides, among other things, that the court imposing the sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum provided by law for the crime for which the person was convicted and sentenced. As the law existed at the time said crime was committed, the minimum penalty for the crime of rape was five years imprisonment and the maximum extended to life. The maximum rested in the discretion of the court, but the minimum was absolutely fixed, and the court in passing sentence upon the prisoner gave him the minimum of five years with a maximum of fifteen years. The prisoner ought to have been sentenced under the provisions of said sec. 6768 and ought to have been given a sentence of not less than five years. The question then arises: Is the sentence imposed absolutely void? Is it so indefinite and uncertain as to be absolutely void? The sentence is not uncertain as to the minimum of five years; no indefiniteness exists as to that term. Then, does the addition thereto of the indeterminate sentence fixing the maximum at fifteen years render the minimum sentence void? We think not.

In 12 Cyc., p. 782, the author says: "Although there is some conflict in the cases upon whether the sentence which imposes a punishment in excess of the power of the court to impose is void *in toto* or is void only as to the excess, the

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weight of authority sustains the proposition that such sentence is valid to the extent that the court had power to impose it, although void as to the excess."

In *Martin v. District Court*, 37 Colo. 110, 119 Am. St. 262, 86 Pac. 82, the court had under consideration the question whether the judgment sentencing a prisoner under the indeterminate sentence law of that state for a crime committed before such law went into effect was void or only voidable, and held that at most it was only voidable and so could not be reviewed by *habeas corpus*. The court said:

"But that doctrine need not be invoked in this proceeding. This sentence is not uncertain as to the minimum length of twelve years. No indefiniteness exists until, at least, that period is passed. We might grant that after the prisoner has served the minimum sentence thus imposed, his confinement thereafter would be illegal, and the courts might release him. The strongest objection that can be urged against this judgment is that it is excessive and indefinite. We have seen that it is not indefinite up to the minimum, and the decided weight of authority is that where a judgment is merely excessive, and the court which pronounces it is one of general jurisdiction, it is not void *ab initio* because of the excess, but is good so far as the power of the court extends, and is invalid only as to the excess, and therefore a person in custody under such sentence cannot be discharged on *habeas corpus* until he has suffered or performed so much of it as it is within the power of the court to impose. This has been expressly decided by the supreme court of the United States in *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. ed. 631, and in other cases therein referred to. See, also, *In re Graham*, 74 Wis. 450, 17 Am. St. 174, 43 N. W. 148, and *In re Graham*, 138 U. S. 461, 11 Sup. Ct. 363, 34 L. ed. 1051."

We think the correct rule is announced in that case, and that until the prisoner has served his term of five years, which may be shortened under the statute by good behavior, he would not be entitled to be discharged on *habeas corpus*.

Great reliance has been placed by counsel for applicant upon the decision of this court in *Ex parte Cox*, 3 Ida. 530,



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Points Decided.

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95 Am. St. 29, 32 Pac. 197. In that case Cox had been indicted for assault with intent to commit murder and was convicted of an assault with a deadly weapon likely to do great bodily harm, and sentenced for a term of five years in the state prison. Under the provisions of sec. 6732, Rev. Stat., the crime for which Cox was convicted was punishable by a term of imprisonment not exceeding two years or fine of \$5,000, or both such fine and imprisonment. It seems that the court passed sentence on the prisoner under the provisions of sec. 6598, Rev. Stat., through mistake, for a crime for which he had not been convicted. This mistake arose from the fact that Cox had been indicted for assault with intent to commit murder but was only convicted of the crime of assault with a deadly weapon likely to produce great bodily harm, and it will thus be seen that that case is distinguishable from the case at bar.

We therefore conclude that the prisoner is not entitled to his discharge. The writ is quashed and the prisoner is remanded to the care and custody of the warden of the state penitentiary.

Ailshie, J., concurs.

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(October 1, 1910.)

In the Matter of the Application of EDGAR M. HEIGHO  
for a Writ of Habeas Corpus.

[110 Pac. 1029.]

**MANSLAUGHTER—CAUSE OF DEATH—FRIGHT AND NERVOUS SHOCK.**

(Syllabus by the court.)

1. Under the provisions of sec. 6565, Rev. Codes, "involuntary manslaughter is defined to be "The unlawful killing of a human being in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

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Argument for Petitioner.

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2. Under the statute of this state, sec. 6565, Rev. Codes, an unlawful killing, though unintentional and involuntary, if accomplished by one while engaged in the commission of an unlawful act, is manslaughter, and the statute does not circumscribe the means or agency causing the death. This statute covers and includes any and all means and mediums by or through which a death is caused by one engaged in an unlawful act.

3. Under the statute of this state, sec. 6565, Rev. Codes, a prosecution for manslaughter may be had where the death of a human being has been caused or accomplished through fright, fear, terror or nervous shock produced by the accused while in the commission of an unlawful act, even though the accused made no hostile demonstration and directed no overt act at the person of the deceased. It would seem that in some instances force or violence may be applied to the mind or nervous system as effectually as to the body.

Original application for writ of *habeas corpus*. Writ issued and hearing had on return thereto. Writ quashed and prisoner remanded to the custody of the officer.

Harris & Smith, and N. M. Ruick, for Petitioner.

It is incumbent upon the state to show that there is such a relation between this act of the accused and the death of Mrs. Riegleman as to prove beyond reasonable doubt that such act was the exact cause of her death. (21 Am. & Eng. Enc. of Law, 97 (c).)

A person must be presumed to do that which he voluntarily and wilfully does in fact do, and that he intends all the natural, probable and usual consequences of his acts (*Commonwealth v. Webster*, 5 Cush. 305, 52 Am. Dec. 711; *People v. Munn*, 65 Cal. 211, 3 Pac. 650), but not all the possible consequences of his act. (*People v. Munn*, *supra*; *People v. Rockwell*, 39 Mich. 503.)

Counsel, after a protracted and careful search, have failed to discover in the books a single case presenting the same precise facts as are here presented. The only cases that approach anywhere near are those cited in note 4, p. 98, 21 Am. & Eng. Enc. of Law.

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Opinion of the Court—Ailshie, J.

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J. L. Richards, Prosecuting Attorney of Washington County, B. S. Varian, and Hawley, Puckett & Hawley, for the State.

A person is responsible for a homicide in whatever manner or by whatever means the death was caused, provided it was caused by his unlawful act or omission resulting in physical or corporal injury. (21 Cyc. of Law & Prac. 694, 695, and authorities cited.)

A person may be guilty of murder or manslaughter, according to the circumstances, if by reason of fright, intentionally and unlawfully caused by him, physical or corporeal injury and death resulted. (*Thornton v. State*, 107 Ga. 683, 33 S. E. 673; *Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617; *Hendrickson v. Commonwealth*, 85 Ky. 281, 7 Am. St. 596, 3 S. W. 166; *Cox v. People*, 80 N. Y. 500; *Hopkins v. Commonwealth*, 117 Ky. 941, 80 S. W. 156, 4 Ann. Cas. 958, and authorities cited in note.)

A person will not be permitted to do an act which jeopardizes the life and safety of another, and then upon the plea of accident escape liability for a homicide involuntarily resulting from his recklessness. (*Potter v. State*, 162 Ind. 213, 102 Am. St. 198, 70 N. E. 129, 64 L. R. A. 942, 1 Ann. Cas. 32; 21 Am. & Eng. En. of Law, 98, 191, and authorities cited; Stephen, Digest Cr. Law, art. 221; *People v. Stubenvall*, 62 Mich. 329, 28 N. W. 883.)

The unintentional killing of a person through the negligent handling of a firearm in any way indicating a disregard of human life is manslaughter. (*State v. Grote*, 109 Mo. 345, 19 S. W. 93; *State v. Emory*, 78 Mo. 77, 47 Am. Rep. 92; *People v. Fuller*, 2 Parker Crim. Rep. (N. Y.) 16; *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466; *Sparks v. Commonwealth*, 3 Bush (Ky.), 111, 96 Am. Dec. 196; *Pool v. State*, 87 Ga. 526, 13 S. E. 556.)

AILSHIE, J.—Petitioner was held by the probate judge of Washington county to answer the charge of manslaughter, and has applied to this court for his discharge on the ground that.

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Opinion of the Court—Ailshie, J.

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the facts of the case do not disclose the commission of a public offense. The evidence produced at the preliminary examination has been attached to the petition. This court cannot weigh the evidence on *habeas corpus*, but if it wholly fails to disclose a public offense for which a prisoner may be held on preliminary examination, then the petitioner would be entitled to his discharge. (*In re Knudtson*, 10 Ida. 676, 79 Pac. 641.)

The facts disclosed by the evidence are in substance as follows: On the 4th day of August, 1910, at Weiser, Washington county, the petitioner, Edgar M. Heigho, hearing that one J. W. Barton had made remarks derogatory to petitioner's character, called one of his employees, Frank Miller, and requested him to accompany petitioner to the residence of Barton. Heigho and Miller went to Barton's residence about 7 o'clock in the evening, ascended the front porch and Heigho rang the door-bell. Mrs. Sylvia Riegleman, the mother in law of Barton, was living at the Barton residence and was in a bedroom at the front of the house, and immediately off from and adjoining the reception-room or hallway at the time the door-bell rang. Barton responded to the call, and as he passed through the front room and was about to open the front door, Mrs. Riegleman, who was then near him, exclaimed, "Oh, he has a gun." Barton stepped out at the door and found Heigho standing on the front porch with a gun, commonly called a revolver or pistol, hanging in a holster or scabbard, which was strapped about his body. Miller stood by the side of Heigho. Heigho asked Barton some questions as to the statements Barton had been making about him, and upon Barton asserting that he had not told anything that was not true or not common talk in the town, Heigho struck him in the face with his fist and Barton staggered back and fell into the wire netting on the screen door. Barton did not rise for a few seconds, and in the meanwhile his wife came and assisted him to arise. Heigho and Miller backed off the porch and stood in front of the doorway. Barton advanced on Heigho and struck him a couple of blows, whereupon they clinched and the wife interfered and separated them and or-

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Opinion of the Court—Ailshie, J.

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dered Heigho and Miller off the premises. Mrs. Riegleman was at this time at the door crying, and had been heard to say a time or two, "He will kill you" or "He has a gun." Barton and wife immediately mounted the porch where Mrs. Riegleman was on her knees resting against or over the banister, apparently unable to rise. She remarked to Barton that she was dying and again repeated something about "him having a gun." She began spitting a bloody froth and rattling in the chest. A physician was called and was unable to give her any relief, and she died inside of about thirty minutes from the time of the appearance of Heigho on the front porch. The physician who attended her made a *post mortem* examination, and testified that she had an aneurism of the ascending aorta and this had ruptured into the superior vena cava and caused her death. He said that excitement was one of three principal causes that will produce such a result. Heigho was thereafter arrested on the charge of manslaughter in causing the death of Mrs. Riegleman by terror and fright while he was engaged in the commission of an unlawful act not amounting to felony.

We are now asked to determine whether under the statute of this state a person can be held for manslaughter where death was caused by fright, fear or nervous shock and where the prisoner made no assault or demonstration against the deceased, and neither offered nor threatened any physical force or violence toward the person of the deceased.

In the early history of the common law, a homicide to be criminal must have resulted from corporal injury. Fright, fear, nervous shock or producing mental disturbance, it was said, could never be the basis of a prosecution for homicide. East, in his Pleas of the Crown, c. 5, sec. 13, says: "Working upon the fancy of another or treating him harshly or unkindly, by which he dies of grief or fear, is not such a killing as the law takes notice of." An examination of the ancient English authorities fully corroborates and establishes this to have been the early English rule. (1 Hale P. C. 425-429; Steph. Dig. Cr. Law, art. 221.) This rule appears, however, to have been gradually modified and greatly

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relaxed in modern times by most of the English courts. So in later years we find the court holding a prisoner for manslaughter where his conduct toward his wife caused her death from shock to her nervous system. (*Reg. v. Murton*, 3 F. & F. 492.)

And in *Reg. v. Dugal*, 4 Quebec, 492, the Canadian court held the prisoner guilty of manslaughter, where with violent words and menaces he had brandished a table knife over his father and the latter became greatly agitated and weakened from the fright and died in twenty minutes thereafter of syncope.

In *Regina v. Towers*, 12 Cox's C. C. 530, decided in 1874, the defendant struck a twelve year old girl, who was holding a small child in her arms, and the child became frightened and went into convulsions and lingered for about six weeks and died, and the court held the facts sufficient to go to the jury on a charge of manslaughter. That is the only reported case that counsel have cited or we have been able to find where death resulted from fright, and the cause of fright had not been directed by the accused at the deceased but had, on the contrary, been directed at some third party. That case is, in principle, so nearly parallel with the one at bar that we quote at length from the opinion. Justice Denman said that "he should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be in the nature of accident. This case was different from other cases of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child. . . . It might be that in this case, unusual as it was, on the principle of common law, manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child, i. e., that the child would not have died but for that assault, they might find the prisoner guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was

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one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for, to commit a murder, a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong, or so violent, as to cause that person to die. Therefore, mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidations had been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed. Then did, or did not, this principle of law apply to the case of a child of such tender years as the child in question? For the purposes of the case, he would assume that it did not; for the purposes of to-day, he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act—whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething, he said that, even though the teething might have had something to do with it, yet if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If, therefore, the jury thought that the act of the prisoner in assaulting the girl was entirely unconnected with it, that the death was not caused by it, but by a combination

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of circumstances, it would be accidental death and not manslaughter."

Counsel for petitioner seeks to distinguish the Towers case from the one at bar, on the ground that the child was not a rational agent and was not capable of understanding that the attack on its nurse was not meant for it. The reasoning of the opinion, however, led the learned judge to the conclusion that the question for the jury to decide would be, "whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case," and that "if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter."

The only case dealing with this question decided by the courts of this country and to which our attention has been called is that of *Cox v. People*, 80 N. Y. 500, decided in 1880. That was a case where the defendant assaulted and bound the deceased and left her in that condition, and it was supposed that she died from fright. In considering an instruction given by the trial court on the subject of death from fright, Mr. Justice Andrews, speaking for the New York court of appeals, said:

"The prisoner's counsel excepted to the charge that 'if the deceased died from fright, and if the fright was caused by the violence of the prisoner, he is as responsible and can as properly be convicted under this indictment of murder in the first degree as if the immediate result of his act was suffocation.' It is claimed that this charge was erroneous, for the reason that it was not charged in the indictment that the killing was by fright superinduced by the acts of violence of the accused. The indictment charges in some counts that the prisoner choked, smothered, stifled and suffocated the deceased, and in others that he assaulted the deceased and killed her by means and instruments to the jurors unknown. It was not necessary, in order to convict the prisoner, that it should appear that his actual personal violence was the sole and immediate cause of the death of the deceased. If his



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violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner's act was in law the cause of her death. We are of opinion that the prisoner was properly convicted under the counts charging an assault, and that the prisoner 'in some way and manner, and by the use of some means and instruments, to the jury unknown,' deprived the deceased of her life, if the jury found that the deceased died from fright superinduced by the prisoner's violence."

As to whether a death caused from fright, grief or terror, or other mental or nervous shock, can be made the basis for a criminal prosecution, has been touched upon but lightly by the text-writers, and none have ventured to enunciate a modern rule on the subject. Such comments and observations as the text-writers have made are valuable as indicating the personal views of the writers touching this matter. Sir James Stephen in his note to art. 221 of his digest of Criminal Law, commenting on the old rule, says:

"Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear, 'Your wife is dead,' intending to kill and killing him; why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct gradually 'breaking a man's heart,' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be murder?"

The author of the text in 21 Am. & Eng. Ency. of Law, 2d ed., p. 98, speaking of the reason for the old rule and the modern trend of authority, says:

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"A hint of the reason for this exclusion may be gathered from Lord Hale's assertion that 'secret things belong to God,' upon which Sir James Stephen comments that he suspects the fear of encouraging prosecutions for witchcraft was the real reason. In default of a better explanation it would seem, therefore, that the rule has no firmer foundation than the ignorance and superstition of the time in which it was formulated.

"Hence the courts have in some later cases shown a tendency to break away from the old rule where substantial justice required it. It will be observed, however, that in all these cases the death has been caused by shock of terror produced by an assault, so that the question in many of its aspects may still be regarded as unsettled. Yet on principle there is no reason why a death from nervous irritation or shock should not be as criminal as any other. It certainly entails greater difficulty in the matter of proof, but this is purely a question of fact, and if the prosecution is able to establish its case by evidence satisfactory to a jury, there seems to be no sufficient reason why the law should forbid a conviction."

Clark & Marshall, on the Law of Crimes, 2 ed., p. 314, says: "It is no doubt very true that the law cannot undertake to punish as for homicide, when it is claimed that the death was caused solely by grief or terror, for the death could not be traced to such causes with any degree of certainty. Working upon the feelings and fears of another, however, may be the direct cause of physical or corporal injury resulting in death, and in such a case the person causing the injury may be as clearly responsible for the death as if he had used a knife."

The statute of this state (sec. 6565, Rev. Codes) defines manslaughter as follows: "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion; 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act

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which might produce death, in an unlawful manner, or without due caution and circumspection.”

Manslaughter has perhaps, in the variety of its circumstances, no equal in the catalogue of crimes. An unlawful killing, though unintentional and involuntary, if accomplished by one while engaged in the commission of an unlawful act, is defined by the statute as manslaughter, and this statute does not circumscribe the means or agency causing the death. The law clearly covers and includes any and all means and mediums by or through which a death is caused by one engaged in an unlawful act. The statute has the effect of raising the grade of the offense in which the party is engaged to the rank of manslaughter where it results in the death of a human being.

With such aid as we get from the foregoing authorities and the independent consideration we have been able to give the matter, we reach the conclusion that it would be unsafe, unreasonable and often unjust for a court to hold as a matter of law that under no state of facts should a prosecution for manslaughter be sustained where death was caused by fright, fear or terror alone, even though no hostile demonstration or overt act was directed at the person of the deceased. Many examples might be called to mind where it would be possible for the death of a person to be accomplished through fright, nervous shock or terror as effectually as the same could be done with a knife or gun. If the proof in such a case be clear and undoubted, there can be no good reason for denying a conviction. If A, in a spirit of recklessness, shoot through B's house in which a sick wife or child is confined, and the shock and excitement to the patient cause death, the mere fact that he did not shoot *at or hit anyone and that he did not intend to shoot anyone* should not excuse him. It should be enough that he was at the time doing an unlawful act or was acting “without due caution and circumspection.”

It would seem that in some instances force or violence may be applied to the mind or nervous system as effectually as to the body. (1 Russell on Crimes, p. 489.) Indeed, it is a well-recognized fact, especially among physicians and meta-

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physicians, that the application of corporal force or violence often intensifies mentally and nervously the physical effects that flow from the use and application of such force or violence.

We express no opinion whatever and refrain from any comment on the evidence in this case. That is a matter to be passed on by a jury. They should determine from all the facts and circumstances whether the accused was the direct and actual cause of the death of the deceased. As was said by Justice Denman in the Towers case, it would be "laying down a dangerous precedent for the future" for us to hold as a conclusion of law that manslaughter could not be committed by fright, terror or nervous shock. The fair and deliberate judgment of a jury of twelve men can generally be relied upon as an ample safeguard for the protection of one who should in fact be acquitted. The dangers of unwarranted prosecutions for such causes are no greater or more imminent than from any other cause, while, on the other hand, the proofs will generally be more difficult. The difficulty of making proofs, however, should never be considered as an argument against the application of a rule of law.

The writ is quashed, and the prisoner is remanded to the custody of the sheriff of Washington county.

Sullivan, C. J., concurs.

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Argument for Appellant.

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(October 1, 1910.)

LEWIS M. BUMPAS, Appellant, v. EDWARD STEIN  
and J. F. ULMER, Respondents.

[111 Pac. 127.]

REAL ESTATE—SALE OF—FALSE AND FRAUDULENT REPRESENTATIONS—  
DAMAGES—NONSUIT.

(Syllabus by the court.)

1. *Held*, that the evidence is not sufficient to show that the respondents knowingly and intentionally misrepresented the area of land contained in block 29, and for that reason the court did not err in sustaining the motion for a nonsuit as to the first cause of action.

2. *Held*, that plaintiff's evidence made a *prima facie* case under the allegations of the second cause of action and that the court erred in granting a nonsuit therein.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action to recover damages on sale of real estate. Judgment for defendants. *Reversed*.

Bogart & Reddoch, for Appellant.

When a positive assurance of an area of a parcel of land is made by the vendor to the vendee, with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement. (*Starkweather v. Benjamin*, 32 Mich. 305.)

The plat represented block 29 as containing 6.6 acres, and respondent Stein represented that the plat was correct. The plat had been made by a competent engineer, and under the evidence in the first cause of action it was a question for the jury, under proper instructions, to determine whether or not the representations were such as to deceive a man of ordinary caution and prudence, under similar circumstances. (*Watson v. Molden*, 10 Ida. 570, 79 Pac. 503; *Sharp v. Ponce*, 74 Me. 470; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *Holst v.*

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*Stewart*, 161 Mass. 516, 42 Am. St. 442, 37 N. E. 755; *Jackson v. Collins*, 39 Mich. 557.)

Appellant had a right to rely upon the stakes as indicating the true line of blocks 24 and 29. "When monuments can be identified, there is a conclusive presumption that the lines are where they indicate." (2 Ency. of Evidence, 711; *Root v. Cincinnati*, 87 Ia. 202, 54 N. W. 206; *Whitehead v. Atchison*, 136 Mo. 485, 37 S. W. 928; *McKinney v. Doane*, 155 Mo. 287, 56 S. W. 304.)

William B. Davidson, Harry Keyser, and Milton G. Cage, for Respondents.

To constitute actionable fraud it must appear (1) that defendant made a material representation; (2) that it was false; (3) that when made he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. (20 Cyc. 13, 24-27, and cases cited in note; *Kountze v. Kennedy*, 147 N. Y. 124, 129, 49 Am. St. 651, 41 N. E. 414, 29 L. R. A. 360.)

Respondents had caused the plat to be surveyed and made by a competent engineer, who had certified to the correctness thereof, and all facts thereon shown. They had adopted the only recognized method to secure actual knowledge of the fact—the actual quantity of land in the several blocks—and were justified in relying upon such information. (*Cabot v. Christie*, 42 Vt. 121, 126, 1 Am. Rep. 313; *Lovelace v. Suter*, 93 Mo. App. 429, 440, 67 S. W. 737; *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736.)

SULLIVAN, C. J.—This action was brought to recover damages on two causes of action, based on alleged false and fraudulent representations knowingly and intentionally made by respondents in the sale to appellant of blocks 24 and 29 of Stein's subdivision in Ada county.

The first cause of action is based on alleged false and fraudulent representations in regard to the number of acres of

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land contained in said block 29; and the second, on alleged damages arising from false and fraudulent representations alleged to have been knowingly made in regard to the southern boundary of said blocks. The answer denied the material allegations of each cause of action.

Upon the issues thus made a jury was impaneled and sworn to try the case, and at the close of the introduction of appellant's testimony, and after he had rested his case, the court granted a motion for nonsuit as to both causes of action and entered judgment against the plaintiff. The appeal is from the judgment, and the errors assigned are to the effect that the court erred in granting said motion for a nonsuit and in entering judgment in favor of respondents.

As to the first cause of action, plaintiff introduced the plat made by the surveyor of said block, which plat gives the dimensions in feet of said block and on the block is marked "6-6/10 acres." The surveyor who made said plat testified that the marking of said block as containing 6-6/10 acres was a mistake made by him and Stein knew nothing about that mistake; that according to the dimensions marked on said plat, said block contained only six acres, and plaintiff testified that the respondent Stein exhibited said plat to him and told him that it must be correct as it was certified to by the surveyor. He also testified that nothing more than that was said by Stein in regard to the area of land contained in said block. This, in substance, was all of the alleged false and fraudulent representations made by respondent Stein in regard to the area of land contained in said block. As the width and length of said block were plainly marked on said plat in figures, had appellant calculated the dimensions as represented by those figures, he would have ascertained that the marking on the map of the area of said block was not correct. It is recited in the deed conveying said blocks to appellant that they were sold to him "as the same appears on the plat of said Stein's subdivision now on file in the office of the county recorder." As the length and width of said block were correctly marked on the plat, the mistake of the surveyor in marking the area thereof could have been

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easily ascertained by the appellant himself. The evidence is not sufficient to show that the respondent Stein knowingly and intentionally misrepresented the area of land contained in said block, and for that reason the court did not err in sustaining the motion for a nonsuit as to the first cause of action. It appears from the record that plaintiff purchased said blocks in bulk and not by the acre.

The second cause of action is based on the ground of false and fraudulent representations made by Stein as to the southern boundary of said blocks. It appears that according to the first survey of the blocks and the first plats made thereof, the southern boundary of said blocks was surveyed and staked forty-five feet south of where the present plat indicates that they are located, and the surveyor testified how that occurred, as follows: "The block as originally surveyed was forty-five feet to the south. Lot 23 was too small and he [Stein] decided to throw the line forty-five feet to the north but I had made the plat and had a lot of the original plats all ready, and he asked me to make a new plat showing these alterations and he would have the block—the stakes—changed. The stakes changed on the ground in the survey that I made were forty-five feet south of where they should be where we changed the line to in making the second plat. The old plat was destroyed and the second plat was filed, altering that forty-five feet."

Stein failed to change the stakes. Mr. McConnell, a partner of Stein's in the real estate business, took the plaintiff out to said blocks to show him the boundaries thereof and he showed him the stakes where the surveyor had placed them, forty-five feet too far to the south, and this would not have occurred had Mr. Stein changed the stakes as he had stated to the surveyor he would. After being thus shown the southern boundary of said blocks, the appellant put improvements thereon and thereafter had to remove the same and was damaged by reason thereof. It is thus made to appear that had Stein moved the stakes as he promised he would do, the damage resulting to the appellant from the erection of his buildings on said forty-five feet would not have occurred. Mr.



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Points Decided.

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Stein knew that the southern boundary of said blocks was not correctly indicated by the stakes, and it appears from the evidence that he permitted his agent to represent to appellant that said stakes did correctly represent the southern boundary of said blocks. Plaintiff's evidence was sufficient to go to the jury, and the court erred in granting a nonsuit on the second cause of action. For that reason the judgment must be reversed and a new trial granted. However, if the respondents consent to having judgment entered against them for the amount of damages and costs of suit proven by plaintiff on the second cause of action, that may be done.

Costs of appeal are awarded to appellant.

Ailshie, J., concurs.

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(October 4, 1910.)

**ELIZA A. WILSON, Appellant, v. W. F. LOCKE, Respondent.**

[111 Pac. 247.]

**ACTION TO QUIET TITLE—TAX LEVY—DELINQUENT TAX—SALE OF PROPERTY—SMALLEST SUBDIVISION—TAX DEED—RECITALS IN—CONCLUSIVE EVIDENCE—PRIMA FACIE EVIDENCE—CONSTITUTIONAL LAW.**

(Syllabus by the court.)

1. A recitation in a tax deed as follows: "That the said least quantity or smallest portion of interest in said land lying and being within said Ada county, as hereinafter described . . . was by the said H. E. Neal, as treasurer of said Independent School District of Boise City, sold and struck off to said W. F. Locke who paid the full amount of said taxes, costs and charges," *held* sufficient to make a *prima facie* case on the question that that was the least quantity or smallest portion of the property sold that the purchaser would take and pay taxes and costs.

2. It is not within the power of the legislature to declare that a tax deed is conclusive evidence of a compliance with all of the requirements that are essential to the exercise of the taxing power, and thus deny the right to defend title against a tax deed as to all jurisdictional questions.

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Argument for Appellant.

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3. That provision of section 177 of the Special and Local Laws of Idaho, p. 40, to wit, that "Any deed derived from the sale of real property under this act shall be conclusive evidence of title except as against actual frauds or prepayment of taxes upon which such sale was made," etc., in so far as it would deny the right to defend title against a tax deed, *held* unconstitutional, as it would result in the confiscation of property without due process of law.

4. Under the provisions of sec. 1765, Rev. Codes, a tax deed duly acknowledged and proved is *prima facie* evidence of the regularity of all of the proceedings therein from the assessment up to the execution of the tax deed. The provisions of that section shift the burden of proof.

5. Where it is made the duty of the treasurer of the school district to make the sale of land for delinquent school taxes, it is sufficient if the clerk of the school board attends and makes the sale at the instance and request of the treasurer.

6. The record fails to show that the trial court rejected any evidence offered to show that any of the jurisdictional requirements of the law in this matter had not been complied with.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action to quiet title. Judgment for defendant. *Affirmed.*

E. J. Frawley, and G. G. Adams, for Appellant.

A statute which undertakes to make a tax deed conclusive evidence of a complete title, and to preclude the owner of the original title from showing the invalidity of such deed, is not a law merely regulating evidence; it is unconstitutional confiscation of property. (Cooley on Taxation, 2d ed., 298, 521; Cooley, Const. Lim., 4th ed., 459; Blackwell, Tax Titles, 4th ed., 83; Black, Tax Titles, sec. 253; 27 Am. & Eng. Ency. of Law, 979, and authorities cited; *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Gardner v. Early*, 69 Ia. 42, 28 N. W. 427; *Allen v. Armstrong*, 16 Ia. 508; *Corbin v. Hill*, 21 Ia. 70; *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 998; *Taylor v. Deveaux*, 100 Mich. 581, 59 N. W. 250; *Marx v. Hanthorn*, 12 Saw. 365, 30 Fed. 579, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. ed. 410.)

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Argument for Respondent.

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If the entire land is sold, the deed should show that this became necessary. (*Brookings v. Woodin*, 74 Me. 222.)

A sale of an entire parcel of land is invalid where there was an omission of the record to show that a sale of the whole "was required to pay the tax, interest and charge," or that the treasurer first offered for sale a fractional part as required by the statute. (*French v. Patterson*, 61 Me. 203; *Straw v. Poor*, 74 Me. 53; *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773; *Martin v. Cole*, 38 Ia. 141; *Norres v. Hays*, 44 La. An. 907, 11 So. 462; *Tucker v. Whittlesey*, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; *Walker v. Moore*, 2 Dill. (U. S.) 256, Fed. Cas. No. 17,080; *Montgomery v. Birge*, 31 Ark. 491.)

A sale by any other than the officer designated for that purpose, or his deputy, is unauthorized and void. (27 Am. & Eng. Ency. of Law, 831; *Hull v. Greeley*, 31 Fla. 471, 12 So. 469; *Hall v. Collins*, 117 Mich. 617, 76 N. W. 72; *Loose v. Navarre*, 95 Mich. 603, 55 N. W. 435.)

D. D. Williams, and John J. McCue, for Respondent.

A landholder cannot, after he has allowed his property to be sold for taxes and the purchaser has acquired title by tax deed, overturn the plain provisions of the tax law through a technicality. (*Quivey v. Lawrence*, 1 Ida. 313; *Co-operative etc. Assn. v. Green*, 5 Ida. 660, 51 Pac. 770; *Bacon v. Rice*, 14 Ida. 107, 93 Pac. 511; *Gwynne v. Neiswanger*, 18 Ohio, 400; *Steeple v. Downing*, 60 Ind. 478; *Callanan v. Hurley*, 93 U. S. 387, 23 L. ed. 931; *De Treville v. Smalls*, 98 U. S. 521, 25 L. ed. 174; *Griffin v. Dogan*, 48 Miss. 11; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Steadman v. Bank*, 7 Ark. 424.)

Many courts of last resort have held that if a law similar to the law under consideration here is not sufficient to make the deed conclusive evidence of title, it is valid, but have decided that such law could not preclude the party claiming adversely to the deed from proving the absence of some jurisdictional fact that would make the deed invalid, such as showing that the land was not subject to taxation, or that the land had been redeemed after the sale where the party has been deprived of some substantial right, and have thrown the

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burden of proving those facts upon the party seeking to impeach the sale. (*Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. ed. 546; *Bronson v. Lumber Co.*, 44 Minn. 348, 46 N. W. 570; *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340; *Milledge v. Coleman*, 47 Wis. 184, 2 N. W. 77; *Coleman v. Lumber Co.*, 30 Fed. 317; *Marsh v. Park Assn.*, 25 App. Div. 34, 49 N. Y. Supp. 384; *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. 632; *Brown v. Allen*, 57 Hun, 219, 10 N. Y. Supp. 714.)

The deed recites specifically that W. F. Locke was the bidder who was willing to take the smallest portion of the interest in said lots and pay the taxes, cost and charges thereof, etc., and also recites that the said least quantity was the whole of the lots. This satisfied the law that the treasurer shall only sell the smallest quantity, etc. (*Rollins v. Woodman*, 117 Cal. 516, 49 Pac. 455; *Doland v. Mooney*, 79 Cal. 137, 21 Pac. 436; *Hewes v. McLellan*, 80 Cal. 393, 22 Pac. 287.)

SULLIVAN, C. J.—This is an action to quiet title to lots 8, 9, 10, 11 and 12 in block 5 of Ireland's addition to Boise City. Said lots were sold by the clerk of the Independent School District under and by virtue of an alleged delinquency and failure to pay school taxes, and penalty, in the sum of \$4.15. The complaint is in the usual form of complaints to quiet title, and prays that the defendant be required to set forth the nature of his claim and that plaintiff be decreed to be the owner of said lots. To this complaint the defendant answered, denying the ownership or the possession of the plaintiff or that she was entitled to the possession of said lots; admitted that plaintiff claimed an estate and interest in said premises, and the whole thereof, adverse to plaintiff; and also, by way of cross-complaint, asked to have the title to said lots quieted in the defendant.

Upon the issues thus made, trial was had and judgment entered in favor of the defendant. A motion for a new trial was denied, and this appeal is from the judgment and order denying a new trial.

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The respondent's title to said lots is founded upon a school tax deed given by the treasurer of the Independent School District of Boise City. During the trial the plaintiff introduced in evidence abstracts of title to said lots and other documents and rested. The defendant thereupon offered in evidence the treasurer's certificate of sale of said real estate to respondent for delinquent school taxes for 1905, also the tax deed of the treasurer of said school district to the respondent. Several objections were made to the introduction of each of said instruments and some of them were as follows: For the reason that the preliminary steps preceding the issuance of said tax deed have not been shown, either as notice, return or report of officer, nor any of the steps required in order to obtain a tax deed under the laws of said Independent School District or under the laws of the state of Idaho, and for the further reason that there is no provision in the school laws creating said school district making the tax deed *prima facie* evidence as to the recitals therein contained; and for the further reason that there is no provision of law whatever that would warrant the introduction of the deed offered in evidence in any event unless the different successive steps required by law to be taken in such matter were first shown to have been taken; and for the further reason that the provisions relative to making such tax deed conclusive evidence of the fact that all the steps required by law in said matter had been taken are void.

The questions presented go to the sufficiency of the proceedings had in the assessment and sale of said lots, the recitals in said deed and to that part of the school law of Boise City (Special and Local Laws of Idaho, sec. 177, p. 40), which provides that "Any deed derived from a sale of real property under this act shall be conclusive evidence of title, except as against actual frauds or prepayment of the taxes upon which such sale was made and shall entitle the holder thereof to a writ from the district court to obtain possession of such property."

It is first contended that it does not appear that the treasurer in making the sale of said property for taxes sold

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the smallest quantity that any purchaser would take and pay the taxes and all costs, as required by law. It is true there is no evidence except that contained in the deed as to the treasurer's having sold the smallest portion of said property anyone would take and pay said taxes and costs. It is recited in the tax deed as follows: "That the said least quantity or smallest portion of interest in said land lying and being with said Ada County, as hereinafter described, . . . . was by the said H. E. Neal, as treasurer of said Independent School District of Boise City, sold and struck off to said W. F. Locke who paid the full amount of said taxes, costs and charges," etc. We think that sufficient to make a *prima facie* case on the point under consideration.

The next question discussed in appellant's brief is the power of the legislature to make tax deeds *prima facie* or conclusive evidence. It is well settled that the legislature does not possess the power to make or declare tax deeds conclusive evidence of a compliance with those requirements that are essential to the exercise of the taxing power, and that a statute that undertakes to make a tax deed "conclusive evidence of a complete title, and to preclude the owner of the original title from showing the invalidity of such deed," is unconstitutional, and would result in confiscation of property without due process of law. (Cooley on Taxation, 2d ed., 298, 521; Cooley on Const. Lim., 4th ed., 459; Blackwell on Tax Titles, 4th ed., 83; Black on Tax Titles, sec. 253.) However, it is competent for the legislature to declare that a tax deed shall be *prima facie* evidence, not only of the regularity of the sale, but of all prior proceedings and of title in the purchaser. But the legislature cannot deprive one of his property by making his adversary's claim to it conclusive of its own validity. (Cooley on Taxation, 2d ed., 183.)

In passing upon a similar question, in *Gardner v. Early*, 69 Iowa, 42, 28 N. W. 427, the court said: "As to this we desire simply to say that the deed cannot be regarded as conclusive evidence of a sale which the treasurer had no power to make."

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In *Taylor v. Deveaux*, 100 Mich. 581, 59 N. W. 250, it is said: "It is not within the power of the legislature to deny the right to defend title against a tax deed," and cites Blackwell on Tax Titles, p. 80; Cooley's Const. Lim., 2d ed., 368. (See, also, *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997.)

It is clear that the great weight of authority as to matters which are jurisdictional, in the exercise of the taxing power, is to the effect that the recitations in a tax deed cannot be made conclusive by legislative enactment, and thus deny the right to defend against such deed. That provision of said section of the school law of Boise City making tax deeds conclusive evidence of title is clearly unconstitutional, unless the phrase in said section, "except against actual frauds," be construed to include all matters which are jurisdictional in the taxing power to levy the tax.

Under the provisions of sec. 1765, Rev. Codes, a tax deed duly acknowledged and proved is *prima facie* evidence of the regularity of all other proceedings therein from the assessment up to the execution of the tax deed. It is contended that the foregoing section does not apply to tax deeds executed by Independent School District of Boise City, but that contention is not well founded. In the absence of a special law applicable to deeds executed by said district, the general law would apply. Making a tax deed *prima facie* evidence of title simply shifts the burden of proof, but does not deny the right to defend title against a tax deed.

We conclude that such tax deeds are *prima facie* evidence of the regularity of all of the proceedings from the assessment of the property, inclusive, up to the execution of the deed, but this does not prevent the owner of the property from showing as a defense that any of the jurisdictional acts in the assessment or sale of the property have not been performed.

There was no effort on the part of the appellant to introduce evidence tending to show that any jurisdictional act required to be done in the assessment and sale of said property had not been done by the treasurer or officer authorized

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Opinion of the Court—Sullivan, C. J.

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to make such sale. There was some evidence introduced to show that the treasurer himself did not make the tax sale, but that the clerk of the school board made the sale under notice given by the treasurer, with his knowledge and consent, and it is contended that the sale is void for that reason. The clerk acted as the deputy or acted for the treasurer with his approval, and it was held in *Commercial Bank of Augusta v. Sandford*, 103 Fed. 98, that sales of land under a tax execution directed to the sheriff are not unlawful because made by a person who acts as deputy with the approval of the sheriff, although his appointment as deputy has not been confirmed by the judge of the court as required by statute, but that his acts are valid as those of an officer *de facto*. The fact that the clerk attended the sale and performed the duties required by law of the treasurer would not invalidate the sale, as he did so with the knowledge and consent of the treasurer.

It is contended by counsel that the respondent has failed to show that the tax certificate was filed with the county recorder, and that such filing is a condition precedent to the execution of the deed, and for that reason the deed was issued without authority of law and passed no title. The law requires such certificate to be issued in duplicate, one to be given to the purchaser and the other to be filed with the county recorder, and the one introduced in evidence no doubt was the duplicate given to the purchaser. There is no evidence in the record to show that the original was not filed as required by law, and it is not necessary for us to pass upon the question whether or not the failure to file the original as required by law was a jurisdictional act. So far as the evidence shows, everything required by law to be done was done in said matter. The record does not show that the trial court rejected any evidence that was offered to show that the jurisdictional requirements had not all been complied with in said matter.

The evidence shows that the plaintiff paid the county and state tax on said lots after said tax sale had been made, and it seems a hardship that she should now lose property that



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Points Decided.

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is worth perhaps a thousand dollars for the insignificant tax of \$4.15; but upon the record before us, this court is powerless to grant her any relief.

The judgment must be affirmed, and it is so ordered.

Ailshie, J., concurs.

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(October 4, 1910.)

W. T. SANDERS, Doing Business Under the Firm Name and Style of RUBY CREEK LUMBER CO., Appellant,  
v. MINNIE KELLER et al., Respondents.

[111 Pac. 350.]

BUILDING CONTRACT—SURETY—MATERIALMAN'S LIEN—WAIVER OF LIEN  
BY SURETY—ADMISSION OF PRINCIPAL BINDING ON SURETY.

(Syllabus by the court.)

1. Where S. subscribes his name to a contract executed by B. and K., and no mention of S.'s name appears in the body of the contract and no reference to his liability is made in the contract, *held*, that S. signed as surety and should be held as such.

2. Where a building contract was indefinite or uncertain in certain particulars and the principal obligor placed his own construction and interpretation on the contract and erected the building in accordance therewith, and there does not appear to have been any fraud or collusion between the contractor and the owner of the building, *held*, that the surety will be bound by the construction placed on the contract by his principal.

3. The surety for a contractor on a building contract cannot maintain an action for the foreclosure of a lien for materials furnished in the carrying out of the contract and erection of the building, where it appears that the full contract price has been paid to the contractor, or on his order, prior to any claim being made by the surety or notice being given to the owner of the building.

4. An admission made by the contractor in the course of the performance of his contract or upon the completion thereof as to having no claims for extras against the owner of the building, *held*, admissible against the surety in an action where the surety seeks to foreclose a materialman's lien for materials furnished in the construction of the building.

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Argument for Respondents.

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APPEAL from the District Court of the Third Judicial District in and for Ada County. Hon. Fremont Wood, Judge.

Action by the plaintiff to foreclose a materialman's lien. Judgment for defendant and plaintiff appealed. *Affirmed*.

William B. Davidson, and Harry Keyser, for Appellant.

A covenant against liens must be an expressed covenant, or must arise as a necessary implication from the language employed. (*Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393; *Nice v. Walker*, 153 Pa. 123, 34 Am. St. 688, 25 Atl. 1065; *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846; *Blyth v. Torre* (Cal.), 38 Pac. 640.)

If the bond is void from the beginning, or has been discharged by the act of the owner, the sureties may assert mechanics' liens on their own behalf. (*Boisot Mech. Liens*, sec. 753; *Deitz v. Leete*, 28 Mo. App. 540; *Hartman v. Berry*, 56 Mo. 487.)

No estoppel can exist against appellant's claim of lien in this case, for even though he signed the bond as surety, he has been released by the act of the principal and owner. (*Oneale v. Long*, 4 Cranch, 60, 2 L. ed. 550; *Leggett v. Humphreys*, 21 How. 66, 16 L. ed. 50; *United States v. Tillotson*, 1 Paine, 305, Fed. Cas. No. 16,524; *Smith v. United States*, 2 Wall. 219, 17 L. ed. 788; *McMicken v. Webb*, 6 How. 292, 12 L. ed. 443; *United States v. Boyd*, 15 Pet. 187, 10 L. ed. 706.)

The surety is released by material alteration of the contract between the principal and the owner, to which he has not consented. (2 Brandt, Suretyship and Guaranty, sec. 747, and the cases there cited; *Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 99 Pac. 856.)

Richards & Haga, for Respondents.

While appellant in the case at bar is not named in the body of the contract, he is nevertheless as firmly bound as

## Argument for Respondents.

if he were named therein. (*Thompson v. Coffman*, 15 Or. 631, 16 Pac. 713; *Pequawsett Bridge v. Mathes*, 7 N. H. 230, 26 Am. Dec. 737; *Smith v. Crooker*, 5 Mass. 538; *Holmes v. State*, 17 Neb. 73, 22 N. W. 232; *Leith v. Bush*, 61 Pa. 395; *Scheid v. Leibskultz*, 51 Ind. 38; *General Electric Light Co. v. Gill*, 127 Fed. 241, 129 Fed. 349.)

When the owner of a building has paid the contractor the amount due on the contract, the contractor's surety is not entitled to foreclose a lien for materials furnished the contractor in carrying out his contract. (*McHenry v. Knickerbocker*, 128 Ind. 77, 27 N. E. 430; *Rynd v. Pittsburg Natorium*, 173 Pa. 237, 33 Atl. 1041; 2 Brandt, Suretyship and Guaranty, sec. 754, and authorities cited; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904; *Kent Lumber Co. v. Ward*, 37 Wash. 60, 79 Pac. 485; *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512; *Dietz v. Leete*, 28 Mo. App. 540; *Stephens v. Elver*, 101 Wis. 392, 77 N. W. 737; *Kiewit v. Carter*, 25 Neb. 460, 41 N. W. 286; *Eakins v. Frank*, 21 Mont. 192, 53 Pac. 538.)

Before a surety is released from performance of his contract or from liability as surety, he must show that the change in the contract is *material and substantial*. (*Stephens v. Elver*, *supra*; *Grafton v. Hinkley*, 111 Wis. 46, 86 N. W. 859; 1 Brandt, Suretyship and Guaranty, sec. 445; *Cooke v. School Dist.*, 33 Ky. Law Rep. 926, 111 S. W. 686; *New Haven v. Nat. Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959; *Benjamin v. Hillard*, 64 U. S. 149, 16 L. ed. 518; *Harper v. Nat. Life Ins. Co.*, 56 Fed. 281, 5 C. C. A. 505; *Fertig v. Bartles*, 78 Fed. 867; *Hooper v. Hooper*, 81 Md. 174, 48 Am. St. 509, 31 Atl. 508; *Anderson v. May*, 10 Heisk. 87; *United States v. Freel*, 92 Fed. 301; *Cambria Iron Works v. Keynes*, 56 Ohio St. 501, 47 N. E. 548; *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419; *Dorsey v. McGee*, 30 Neb. 657, 46 N. W. 108; *Prescott Nat. Bank v. Head* (Ariz.), 90 Pac. 328; *Fuller Co. v. Doyle*, 87 Fed. 687; *United States v. Hodge*, 6 How. 279, 12 L. ed. 437.)

Admissions of principal are binding on surety. (2 Wigmore, Evidence, sec. 1077; Jones on Evidence, sec. 239; Elliott on Evidence, sec. 253.)

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Opinion of the Court—Ailshie, J.

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AILSHIE, J.—This action was instituted to foreclose a materialman's lien. A contract was entered into between J. W. Brown and the respondent, Minnie Keller, whereby Brown agreed to furnish all material and construct and complete a dwelling-house according to the draft thereto annexed. The draft annexed to the contract was a drawing and diagram of the floor plan of a dwelling-house, showing the dimensions of the various rooms, doors, windows, etc. In addition to being signed by Brown and Keller, the contract was also signed by W. T. Sanders, the appellant, and one N. H. Hon. No mention was made of the names of Sanders and Hon or of their liability in the body of the contract. It was therefore contended by the respondent, and it was found and held by the trial court, that Sanders and Hon were sureties on the contract. Of the correctness of this holding there can be but little room for doubt. (*Thompson v. Coffman*, 15 Or. 631, 16 Pac. 713; *Neil v. Morgan*, 28 Ill. 524; *Holmes v. State*, 17 Neb. 73, 22 N. W. 232; *Leith v. Bush*, 61 Pa. 395.)

The contract was signed by Brown and the sureties prior to its submission to and execution by Mrs. Keller. Sanders says that he did not see or examine any exhibits of plans or specifications attached to the contract. The contract itself is vague and uncertain as to the character of building to be constructed and of the manner of construction and detail in general. Brown erected the building, and in doing so apparently procured most of the lumber from his surety, Sanders. Brown placed his own construction and interpretation on the contract, and apparently built the building in accordance with this understanding of the purpose and intent of the contract. Several changes were made from that indicated by the draft and crude specifications attached to the contract. Brown was not present at the trial and did not testify in the case. Mrs. Keller testified that only one change was made by Brown at her instance and request, and that she paid Brown the extra charge for that change over and

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above the contract price. She also paid a plumber for a change in the plumbing.

About the time of the completion of this work, and when Mrs. Keller was making final settlement for the contract, she procured from Brown a written statement to the effect that he had no charges against her for extras on account of building the house, except for five dollars for putting in a door in place of a window. She thereupon paid the extra five dollars, and paid either to Brown directly or to his order laborers and materialmen the full contract price. Appellant thereafter filed his lien for materials furnished.

The evidence in the case fully sustains the findings made by the trial court to the effect that whatever changes were made in the construction of this building, except as to a door, were made by the contractor himself on his own motion. The record is quite clear to the effect that the building was constructed by the contractor upon his own interpretation and construction of the requirements of the contract and the plans and specifications which accompanied the same. It must be conceded that the contract and plans and specifications were extremely meager and left a great deal to be implied. The appellant, however, as surety for the contractor, should, in the absence of a showing of any fraudulent agreement or collusion between the contractor and respondent, be held to the construction and interpretation placed on the contract by appellant's principal, the contractor. The surety signed the contract for a purpose, and he must have either read and understood it or else left it to the judgment of the principal, and in either case it must be liberally construed with a view to accomplish the fair and reasonable intent of the parties. (*Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620.) No change has been shown in the contract sufficient to release the sureties. (*Stephens v. Elver*, 101 Wis. 392, 77 N. W. 737; *New Haven v. National Steam Economizer Co.*, 79 Conn. 482, 65 Atl. 959; 1 Brandt on Suretyship and Guaranty, sec. 445.)

It is a well-established rule of law that the surety for a contractor on a building contract cannot maintain his action

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for the foreclosure of a lien for materials furnished where the full contract price has been paid to the contractor. (2 Brandt on Suretyship, sec. 754; *Rynd v. Pittsburgh Natatorium*, 173 Pa. 237, 33 Atl. 1041; *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846; *Morse v. Mansfield*, 10 Wash. 373, 38 Pac. 1050; *Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393; *Blyth v. Torre* (Cal.), 38 Pac. 640; *Stephens v. Elver*, 101 Wis. 392, 77 N. W. 737.) We should not feel like following this line of authorities, however, in a case where the whole contract price had not been paid prior to receipt of notice by the owner that the surety had a claim for material furnished. Where notice is given the owner would clearly not be justified in making further payments to the contractor to the injury of the surety. Respondent having paid the full contract price to the contractor Brown and on his orders should not be held by the surety for any greater sum on account of materials furnished.

It has been suggested by counsel for appellant that this contract did not include the plumbing for the building, and he introduces some evidence to the effect that under such a contract as this plumbing would not reasonably be included. Whatever may be conceded as to the correctness of that position generally, either in law or fact, it is fully established in this case that the plumbing was put in the building by the contractor on his own motion and of his own accord and was paid for on his order. We are confronted here with the proposition that the contractor evidently interpreted his contract as including the plumbing for the building. It is fully established that respondent never at any time ordered the plumbing put in or had anything to do with the plumbing contract, unless it was included in the original contract for the construction of the building. The contract was evidently construed by both the contractor and the owner of the building as including the plumbing.

Counsel for appellant has taken an exception to the admission in evidence of the written statement made by the contractor to the effect that he had no charge against respondent for extras, except five dollars for putting in a door instead

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Points Decided.

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of a window. It seems to be a well-established rule of evidence that statements or admissions made by the principal in the course of the performance of the contract are binding on a surety. In such case they are held to be a part of the *res gestae*. (2 Wigmore on Ev., sec. 1077; 1 Elliott on Ev., sec. 253; Jones on Ev., 2d ed., sec. 238.)

We find no error for which a reversal of the judgment should be had. Judgment *affirmed*, with costs in favor of respondent.

Sullivan, C. J., concurs.

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(October 15, 1910.)

**ROBERT LANSDON, Plaintiff, v. STATE BOARD OF  
CANVASSERS, Defendant.**

[111 Pac. 133.]

**PRIMARY ELECTION—CANVASSING RETURNS—DUTIES OF CANVASSING  
BOARD—JURISDICTION OF CANVASSING BOARD—WRIT OF REVIEW—  
CONDUCTING ELECTIONS A POLITICAL POWER—JURISDICTION OF  
COURTS IN ELECTION MATTERS.**

(Syllabus by the court.)

1. A writ of review brings up the record of the tribunal, board or body whose acts are to be examined, and is issued for the purpose of reviewing the law applicable to the case, instead of examining the facts of the case, except in so far as an examination of the facts is necessary in the determination of the single question of jurisdiction. The purpose of the review is to determine primarily the law applicable to the case rather than the facts of the case.

2. The state board of canvassers in canvassing election returns sent up by the boards of canvassers of the several counties and computing the total vote received by each candidate and certifying to the secretary of state the names of the persons who received the majority or plurality, as the case may be, of all votes cast for each respective office, is discharging a ministerial duty rather than a judicial function. Mathematical computation and calculation does not constitute the exercise of judicial functions.

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Argument for Plaintiff.

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3. It is the nature of the act to be performed rather than of the office, board or body which performs the act that determines whether or not it is the discharge of a judicial or *quasi-judicial* function.

4. The fact that the state board of canvassers on receiving returns from the boards of canvassers of the several counties did not consider such returns inaccurate, uncertain, or as showing on their face omissions or errors, and their consequent neglect or refusal to send the same back to the county boards of canvassers for correction, does not constitute an excess of jurisdiction, nor does it oust the board of the jurisdiction acquired to canvass returns and declare the results.

5. It is not the business or duty of the state board of canvassers to determine whether or not any illegal votes have been cast or legal votes rejected; they have no way to know whether more votes have been counted than were actually cast or that the count has been made in every instance correctly by the various election officers or canvassing boards. The duty of the state board of canvassers is that of casting up the returns and declaring and certifying the result as shown by the returns.

6. *Green v. State Board of Canvassers*, 5 Ida. 130, 95 Am. St. 169, 47 Pac. 259, considered and distinguished.

7. The right to vote and hold office is not one of the inalienable rights of the citizen; the regulation of that privilege conferred on the citizen has been delegated to the political department of the state government, and will not be controlled or interfered with by the courts, except in so far as the law-making power has provided a remedy that may be pursued in the courts, or in cases where the law commands action and election officers or boards refuse to act, or where such officers or boards attempt to act in a manner contrary to or violative of the statute.

8. Under the direct primary nomination law of this state, there is no provision for the contest of the nomination of a candidate for the office of governor.

Original application by the secretary of state against the state board of canvassers for a writ of review. Demurrer to petition sustained, writ denied and action dismissed.

Edwin Snow, for Plaintiff.

Under our statute the state board of canvassers is certainly vested with judicial functions. (Sec. 458, Rev. Codes.)

The petition alleges that the abstracts of votes sent to the state canvassers from the various counties showed on their



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Argument for Defendant.

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face that 6,849 more first choice votes for the office of governor on the Republican ticket were certified and returned than second choice votes.

The case of *Adams v. Lansdon*, ante, p. 483, 110 Pac. 280, decided that all ballots which failed to designate a second choice were illegal.

The face of the returns before the state canvassers clearly showed, then, without any room for dispute, that there were nearly twice as many illegal votes returned in the abstracts as the plurality of the leading candidate amounted to. Should it not, then, have *clearly appeared to the canvassers*, at least, that certain matters were omitted from the abstracts and that they should have been returned for correction? And was not this determination judicial in its nature? (*Stein v. Morrison*, 9 Ida. 426, 75 Pac. 246.)

The cases cited by the defendant board are inapplicable: first, because they are all from other states where the statutes governing the duties of the state board of canvassers differ from ours, and, secondly, because all the cases cited by defendant can be shown to have been decided under circumstances where the duties of the board with respect to determining who was elected were called in question, and not where the duties of the board with respect to determining the *validity of the returns* were raised.

The only reported case in which the action of the state board of canvassers was litigated in this court was upon a *certiorari* proceeding. (*Green v. State Board of Canvassers*, 5 Ida. 130, 95 Am. St. 169, 47 Pac. 259.)

Certainly it could not be contended that the board has jurisdiction to act in a patently unlawful manner and certify nominees upon returns shown on their face to be void. (*State v. State Canvassers*, 36 Wis. 498; *State v. Baker*, 38 Wis. 71; 15 Cyc. 381.)

Cavanah & Blake, and Edgar Wilson, for Defendant.

The act of the state board of canvassers, in certifying these nominations to the secretary of state, was not in any sense judicial, but purely ministerial in character. (*Adleman v.*

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*Pierce*, 6 Ida. 294, 55 Pac. 658; *Murphy v. Board of Equalization*, 6 Ida. 745, 59 Pac. 715; *Bank of Commerce v. Wood*, 13 Ida. 794, 93 Pac. 257.)

“*Certiorari* does not lie to review the acts of an election board in receiving votes, and announcing the result, as they are not judicial in character.” (*People v. Austin*, 20 App. Div. 1, 46 N. Y. Supp. 526; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; McCreary on Elections, 3d ed., secs. 226, 229.)

In a republican form of government the courts should hesitate long before interfering in respect to the actions of canvassing boards affecting elections. That is not one of the functions of the courts, and we believe is never assumed to be the duty of the courts unless fraud is alleged and proven.

Even if boards of this character make errors (although in this case even error is not claimed in the petition), it is not the province of the courts to correct that by this extraordinary remedy. (*Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716; *People ex. rel. Lemby v. Duinelle*, 29 Cal. 632.)

“Where great public detriment or inconvenience would or might have resulted from interfering with the proceedings of public bodies which exercise rights in which the people at large are concerned, and no substantial injury would result from its refusal, the writ has been denied, and its allowance in such cases is discretionary.” (6 Cyc. 748, and cases cited.)

AILSHIE, J.—In this proceeding it is sought to review the action of the state canvassing board. Since the right of the plaintiff to proceed by writ of review is questioned, it is necessary to recall the province of that writ and the scope of its operation. Under the statute, sec. 4962, the writ will only issue to review the exercise, or rather excessive exercise, of judicial functions. A writ brings up the record of the board, tribunal or body whose acts are to be examined. The statute, sec. 4968, provides that, “The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.” This is not, therefore, a remedy by which the facts in any given case or controversy

may be reviewed, except in so far as it is necessary to consider the facts in the determination of the single and sole question of *jurisdiction*. The purpose of the review is to determine the law applicable to the case and not the facts.

In *McConnell v. State Board of Equalization*, 11 Ida. 662, 83 Pac. 494, this court said: "The writ of review is not a remedy for correcting errors and mistakes of judgment, neither can it be invoked for the purpose of reviewing the facts upon which the inferior tribunal, board or officer acted, except for the purpose of ascertaining the one fact of jurisdiction. Its province is limited entirely to a review of the questions of law involved in the matter. The court should in such cases always confine its inquiries to the question as to whether or not the action complained of was beyond and in excess of the jurisdiction conferred on the tribunal, board or officer."

That holding has been reiterated by this court time and again. (*Sweeney v. Mayhew*, 6 Ida. 455, 56 Pac. 85; *Adleman v. Pierce*, 6 Ida. 294, 55 Pac. 658; *Coeur d'Alene M. Co. v. Woods*, 15 Ida. 26, 96 Pac. 210; *Utah Assn. of Credit Men v. Budge*, 16 Ida. 757, 102 Pac. 390, 691.)

Now, it will appear at once that if the record, to wit, the election returns from the several counties as filed with the state board of canvassers should be certified up to this court as requested by the plaintiff, there would be nothing to determine by this court except as to whether or not the board had jurisdiction to canvass the returns, compute the total number of votes received by each candidate as they appear from the returns, and certify to the secretary of state the names of the persons who received the majority or plurality, as the case may be, for each of the various offices shown and designated on the returns. This is the very thing that the plaintiff alleges the board did, and it is of that action that he complains.

It would have to be conceded that the board has the general power and jurisdiction to canvass election returns and declare the result. Plaintiff contends, however, that since these returns show some six thousand more first choice votes as

having been cast for the various candidates for governor than there are second choice votes shown by the returns, it must be assumed that the various election officers—either the precinct officers or the canvassing boards of the several counties—have counted, computed and returned to the state canvassing board some six thousand more first choice votes than were in fact cast at the late election. If this were conceded to be a fact, still that fact did not oust the state canvassing board of its jurisdiction to canvass the returns and certify the result. It is true that if such fact appeared it might influence the canvassing board in determining as to whether or not they should send the returns back to the several counties for correction, but as to whether they do that or not, although their action might be erroneous, it would not affect their jurisdiction. (2 Spelling on Injunctions and Extraordinary Remedies, sec. 1891; *Utah Assn. of Credit Men v. Budge*, 16 Ida. 757, 102 Pac. 390, 691.) They clearly have the jurisdiction, under sections 457 and 458 of the Rev. Codes, to send the returns from any county back to the board for correction; but to do so or decline to do so, either, is not an excess of jurisdiction. To do so or to decline to do so does not oust the board of its jurisdiction to canvass the returns and declare the result.

Sec. 457 of the Rev. Codes provides that, “whenever the board of county canvassers, or of state canvassers, shall find that the returns from any precinct, ward, county or district (as the case may be) do not strictly conform to the requirements of law, in the making, certifying and returning of the same, the votes polled in such precinct, ward, county or district shall, nevertheless, be canvassed and counted if such returns shall be sufficiently explicit to enable such boards, or any person or persons authorized to canvass votes and returns, to determine therefrom how many votes were polled for the several persons who were candidates and voted for at the election of which the votes are being canvassed.”

Sec. 458, in further aid of the provisions of sec. 457, says: “If upon proceeding to canvass the votes it shall clearly appear to the canvassers that in any statement produced to

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them certain matters are omitted in such statement which should have been inserted, or that any mistakes which are clerical, merely, exist, they shall cause the said statement to be sent by one of their number (whom they shall depute for that purpose) to the precinct or ward judges, or to the county board of canvassers (as the case may be) from whom they were received, to have the same corrected; and the judges of election or county auditor (as the case may be), when so demanded, shall make such correction as the facts of the case require, but shall not change or alter any decision before made by them, but shall only cause their canvass to be correctly stated; and the canvassing board may adjourn from day to day for the purpose of obtaining and receiving such statement: Provided, always, That they shall not delay counting past the day provided by law for the completion of the canvass."

It would appear from the petition in the case that the returns from the several counties were sufficiently full, complete and explicit to satisfy the state board of canvassers, and to, in their judgment, justify them in proceeding to canvass the returns and declare the result. It is not the business of the board to determine whether any illegal votes have been cast or not; indeed, they have no way to know either whether more votes have been counted than were actually cast, or that the count has been made in every instance correctly by the various election officers or canvassing boards. The duty of the state canvassing board is that of adding up the votes received by the several candidates as returned by the canvassing boards of the several counties and ascertaining the total vote and declaring and certifying the result. These are purely clerical, ministerial and administrative acts and involve no judicial discretion.

In the case of *State v. Osburn*, 24 Nev. 187, 51 Pac. 838, the supreme court of Nevada held that "the determination as to the result of an election by a canvass of the returns by the city council is not a judicial act, but is purely a matter of calculation, and hence cannot be brought up for review by *certiorari*." This proposition is sustained by many authori-

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ties. (McCreary on Elections, 3 ed., sec. 226; *Bouldin et al. v. Lockhart*, 3 Baxt. (Tenn.) 262; *Esmeralda Co. v. Third District Court*, 18 Nev. 438, 5 Pac. 64; concurring opinion of Maxwell, J., in *State ex rel. Benton v. Elder*, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 800; *State v. Barber*, 4 Wyo. 56, 32 Pac. 14; 15 Cyc. 380.)

We will not undertake to say at this time that the board could not, under any circumstances, perform a judicial or quasi-judicial function in the discharge of its duties as a canvassing board. It is the nature of the act rather than of the office or board which performs the act that determines whether or not it is the discharge of a judicial or quasi-judicial function. (*Quinchard v. Board of Trustees*, 113 Cal. 664, 45 Pac. 856; *State v. Osburn*, 24 Nev. 187, 51 Pac. 837.)

In the case at bar, however, it is clear that no judicial function has been invoked or called into action. We are not unmindful of the case of *Green v. State Board of Canvassers*, 5 Ida. 130, 95 Am. St. 169, 47 Pac. 259, on which plaintiff relies as authority for resorting to the writ of review to review the action of the board in canvassing the vote and declaring the result. That was a friendly suit invited by resolution of the canvassing board in order to get a construction by the court of art. 20 of the constitution, and no question was raised as to review being the proper remedy, nor do we desire to be understood as questioning but that it was the proper remedy in that case. There the only thing to be determined was whether or not the board reached the right conclusion of law upon the facts that it had found. After canvassing the vote the board made a finding that 12,126 votes had been cast in favor of the amendment and 6282 votes against it. The board thereupon concluded and so certified that the amendment had been lost. This was based wholly and solely upon the construction which the board placed on the several provisions of art. 20 of the state constitution. No question of fact was involved. It was purely a question of law. The court considered the matter and reached the conclusion that the canvassing board had exceeded its jurisdiction as a matter of law when it decided that in order to adopt

an amendment to the constitution, it required a majority of all the electors of the state who voted at that election instead of requiring a majority of all the electors who voted on that particular amendment. So it might be here. If one candidate had received a clear majority of all the votes cast and the board should so find and yet should certify his opponent as having been nominated, there would certainly be a remedy. This would be an error of law instead of fact.

It has been argued very forcibly by counsel for plaintiff that in this case there is no remedy by appeal, no remedy by *mandamus*, no remedy by prohibition, and no remedy by contest, and that since there must be a remedy for every wrong he must be entitled to invoke the writ of review. It is a maxim of the law that for every wrong or injury the law affords a remedy. That has its exceptions, however, the same as all other maxims and rules that have been devised by man, and that exception is to be found in popular elections. Each member of society has to suffer some burdens and inconveniences for the sake of society or in order that some other member of society may exercise his equal rights as a citizen. A man may be defeated by all kinds of foul and unfair means having been used against him with the electorate of the state, and yet he may not find any remedy in the courts. (*Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716.) If he has any remedy at all, he must seek it before the people. This grows out of the very nature of popular elections. Falsehood and misrepresentation which would vitiate a contract or afford a man relief in a civil action involving his business and property interests is often passed unrebuked and is sometimes rewarded with victory in politics.

It has been repeatedly held by numerous courts that the holding of elections belongs to the political branch of the government, and is beyond the control of the judicial power of the state except in so far as the law-making body has specifically vested such power in the courts; that it was not designed by American constitutions that any one department of government should interfere with or control another; and that it is for the political power of the state within the

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limits of the constitution to provide the manner in which elections shall be held, the manner of conducting the same and declaring the result and the manner in which elections shall be contested if at all. This doctrine was enunciated in *Dickey v. Reed*, 78 Ill. 261, and was reiterated and affirmed in *Douglas v. Hutchinson*, 183 Ill. 323, 55 N. E. 628, and in *Williamson v. Lane*, 52 Tex. 335, and the same doctrine was announced and those cases were followed by this court in *Toncray v. Budge*, 14 Ida. 636, 95 Pac. 26.

It will also be seen from a mere cursory examination of the authorities that the courts have been extremely reluctant to interfere with the holding and conducting of elections in any manner except as specially authorized by the statute or constitution. Since the right to vote and hold office is not among the inalienable rights of which the American people are so jealous, the regulation of this branch of the rights and privileges of the citizen has been delegated to the political department of the state in every state in the Union. (15 Cyc. 280, 281, and cases cited.)

And so it may happen, and often does, that in the course of elections many persons who are either defeated candidates or the friends and supporters of those candidates may feel that they have been wronged either by someone being allowed to vote who was not an elector or some vote being improperly rejected or improperly counted, but the aggrieved party must depend upon the honesty and sense of fair dealing of those conducting the elections for his redress unless a specific remedy is pointed out by law for such a case. Where the law commands action and election officers or boards refuse to act, the courts will also compel action, or where they attempt to act in a manner contrary to or violative of the statute, the courts will reach out and restrain them, but will never interfere to correct mere errors or irregularities unless specifically so authorized.

It is clear that there is no such thing as a contest provided for by the primary election law for the office of governor, because contests for governor take place before the legislature meets. But aside from this it is extremely doubtful if the



primary election law provides for or contemplates any such thing as a contest. The very nature of a primary election law would seem to preclude any proceeding such as a regular contest is usually conducted in the ordinary course of law. Under the ordinary procedure pointed out for conducting election contests the general election would be over before a primary contest could be finally settled in the courts; unless, indeed, the courts abandon all their ordinary civil and criminal work and convert themselves into courts for the hearing of election contests. A contest after the general election can take place in due course of law because there is someone occupying the office who is qualified to discharge its duties, and there will therefore be no *interregnum* or cessation in the performance of the public duties. But there is such a short time intervening between the primary election and the general election that contests could not generally be heard and finally determined in accordance with the general laws providing for contests, and nothing but a summary proceeding could be reasonably provided. It may be desirable that such a law should provide for a summary recount or contest in cases where it is alleged that a gross error or a fraud has been committed in the count or canvass of the vote, but such a remedy is not essential to the validity of the law. Conventions have been recognized by statute, and indeed provided for in many states for years, and yet no one ever thought of providing for contesting the result of a convention or having a recount of votes cast or anything of that kind, and still it was recognized all along that many wrongs were committed and often fraud practiced in the holding of conventions. A primary election law is merely a substitute for a convention, and the only thing accomplished by it is that of selecting candidates for the several parties whose names shall go on the official ballot for the general election.

Under the primary election law as construed by this court in *Adams v. Lansdon*, *ante*, p. 483, 110 Pac. 280, there being more than two candidates for governor at the late primary election, it was necessary for the voter to cast both a first and second choice vote. If, therefore, every first and second

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choice vote cast had been correctly counted and retained by the election officers, the abstracts from the various counties would show the same number of first choice votes as having been cast for governor that it would show of second choice votes. As a matter of fact, however, according to the complaint of the plaintiff herein the returns show a discrepancy of 6,849 votes, there being that many more first choice votes returned for governor than there were second choice votes. It is claimed that this fact appearing on the face of the returns rendered them so irregular and defective that it was clearly and unmistakably the duty of the board under the provisions of sec. 458 to send them back to the counties for correction before proceeding to canvass the vote. It is further claimed that the failure to do so amounts to an excess of jurisdiction on the part of the board which should be reviewed by this court.

As heretofore stated, if it should be conceded that this was error on the part of the board, still it could not be termed an excess of jurisdiction nor did it oust the board of jurisdiction to proceed and canvass the vote. Taking the allegations of the complaint as true, which we must do for the purposes of this demurrer, it is then clear that the election officers or canvassing boards have either counted and returned more first choice votes than were actually cast or fewer second choice votes than were in fact cast. It is, however, more reasonable to assume that the latter is true than the former, and it is most likely that the board took that view of the matter. It is altogether probable that election officers in many of the precincts where second choice votes were cast for persons whose names were not on the official ballot did not return these miscellaneous second choice votes to the county canvassing boards, and that in that manner the count of a great many scattering second choice votes that were cast promiscuously for persons whose names did not appear on the official ballot were lost between the time of the count in the precinct and the certification of the official canvass to the state board. Had the board sent back these several returns to the county canvassing boards, the county boards

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would in all probability have been unable to account for this shortage or difference. But the state board has no power or authority to compel the county canvassing board to send the precinct returns back to the several precincts for a recount, and it is altogether probable that many of the county boards would have declined to do so. Neither could this court on *certiorari* order the board to send the returns back to the several counties. This same state of facts and condition might as easily arise in a general election as in a primary election. Someone might conceive the idea that all the votes for some particular office had not been counted, or else that too many votes had been counted for some other office. It often happens in the general election that the candidates for some particular office on the ticket have altogether received some thousands of votes more than all the candidates for some other office on the same ticket have received. Upon the same reasoning that is urged here someone might insist on the board sending such returns back for correction or a recount. There is no authority, either in law or practice, for such a procedure.

Some errors will necessarily occur in the holding of elections. It is perhaps safe to say that no election was ever held that was free from error, but no man has any vested right in an office or in the right to run for office. Upon the whole and in the aggregate the results obtained accomplish substantial justice and achieve the will of the people. Persons who become candidates for office must of necessity assume the risks and run the chances of mistakes and errors being made in the holding of elections. In the conducting of elections by popular vote, much has to be trusted to the honesty and integrity of election officers and the people at large and to the vigilance of the electors in detecting error or fraud and causing its correction at the time when and place where it is committed. Fortunately, in this country, there can scarcely be found an election precinct anywhere in which all the electors are the friends or partisans of any single candidate or of any one political party, and so it generally happens that the vigilance of the friends and adherents of opposing candi-

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Points Decided.

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dates of the same party or of opposing parties tends to hold the others in reasonable restraint from committing serious errors or excesses.

The complaint fails to show that the canvassing board has exercised any judicial functions or has exceeded its authority in the exercise of any of its powers, and we conclude that the writ of review will not lie to examine its action in canvassing the election returns. We are also satisfied that if this were a case in which the writ might issue that the facts pleaded would not authorize or justify the court in vacating or modifying the action of the board in canvassing the returns and certifying the result. Demurrer sustained, writ denied and action dismissed. No costs awarded.

Sullivan, C. J., concurs.

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(October 17, 1910.)

STATE, Respondent, v. GEORGE SCHWEITZER, Appellant.

[111 Pac. 130.]

IRREGULAR VERDICT—SHORT WEIGHTS—SELLING BY SHORT WEIGHT.

(Syllabus by the court.)

1. In a prosecution for unlawfully selling lard by short weight a verdict by the jury in the following form: "We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights as charged in the complaint," is sufficiently definite and certain as to the intent of the jury to "find the defendant guilty as charged in the complaint" to justify and support a judgment of conviction.

2. Where M. went to a butcher-shop and told the manager thereof that he wanted to buy "a three-pound pail of lard" and he was given a pail of lard commonly known and designated as a three-pound pail, for which he paid the price demanded, and upon

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weighing the same it appeared that the bucket and lard together weighed the gross sum of three pounds and three-fourths of an ounce, and that the net weight of the lard contained in the bucket was two pounds and nine and one-half ounces, and the vendor of the lard is subsequently prosecuted under the provisions of sec. 7109 of the Rev. Codes, for selling by short weight, it is a question to be submitted to the jury as to whether or not the purchaser offered to buy and the seller represented that he was selling three pounds of lard net or gross, and it was error for the court to instruct the jury that when the purchaser asked for a three-pound pail of lard "he must be taken to have meant, and the defendant must be taken to have understood, that the purchaser was to receive three pounds of lard irrespective of the weight of the pail."

APPEAL from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County. Hon. Fremont Wood, Judge.

Prosecution for sale of lard by short weights under the provisions of sec. 7109 of the Rev. Codes. Verdict and judgment of conviction, from which defendant appealed. *Reversed.*

C. M. Kahn, and Hawley, Puckett & Hawley, for Appellant.

The jury in this case did not find against the defendant upon the issue as expressed in the complaint, nor was there a special verdict found; but it sought to and did find appellant guilty of a crime—or supposed crime, rather—which is not only not charged in the complaint but is not known in the criminal law generally, and is not a creature of our statute, to wit, "selling by short weights."

California has a statute identical with sec. 7929, from which our section was undoubtedly taken. (Kerr's Cal. Code (Penal), sec. 1162; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *People v. Small*, 1 Cal. App. 320, 82 Pac. 87; Bishop's New Criminal Proc., sec. 1005.)

The facts as shown by the respondent were not sufficient to justify such a verdict and judgment even if the same is valid and was properly rendered and entered. (*Harris v.*

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*Allwood* (Eng.), 57 J. P. 7; *State v. Swift & Co.*, 84 Neb. 244, 120 N. W. 1127.)

The court erred in giving instruction No. 6. What the complaining witness meant and what the appellant understood in this transaction were matters to be determined by the jury from the evidence, and it was error upon the part of the court to instruct them as to such meaning or understanding.

D. C. McDougall, Attorney General, Chas. P. McCarthy, Prosecuting Attorney, and B. S. Crow, for Respondent.

If it were necessary to name the offense, since the statute itself does not give a name to the offense, a brief general description is sufficient. (22 Cyc. 302, and cases under note 49.)

“Generally, indictments or informations for statutory offenses, although they give an erroneous appellation, or fail to give any appellation to the offense, if the facts constituting the offense as defined by the statute are sufficiently stated, are good.” (22 Cyc. 302, and cases under notes 51 and 52; *People v. McCarty*, 48 Cal. 559; *People v. Brady* (Cal.), 65 Pac. 823.)

It is very generally held that the verdict is good if the intention of the jury can be ascertained. (*Kellum v. State*, 64 Miss. 226, 1 So. 174; *State v. Wilson*, 40 La. Ann. 751, 5 So. 52, 1 L. R. A. 795; *Cheek v. Commonwealth*, 87 Ky. 42, 7 S. W. 403; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444; *Bidwell v. State* (Tex. Cr.), 20 S. W. 556; *Stepp v. State*, 31 Tex. Cr. 349, 30 S. W. 753; *Pave v. State* (Tex. Cr.), 20 S. W. 762; *Jenkins v. State*, 92 Ga. 470, 17 S. E. 693; *People v. O’Callaghan*, 2 Ida. 156, 9 Pac. 414; *State v. Collyer*, 17 Nev. 275, 30 Pac. 891; *Burgess v. State*, 33 Tex. Cr. 9, 24 S. W. 286; *Wallace v. State*, 70 Tenn. (2 Lea) 29; *State v. Jenkins*, 60 Wis. 599, 19 N. W. 406.)

AILSHIE, J.—Appellant was convicted of a misdemeanor in the district court for a violation of sec. 7109 of the Penal Code. The complaint charged that the defendant did “unlawfully sell to one Claude D. Mason, as three pounds of

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lard, a certain bucket of lard which then and there contained only two pounds nine and one-half ounces of lard, and was not then and there full weight, at the rate of sixteen ounces to the pound, lard being then and there an article which is sold in commerce by avoirdupois weight." The jury rendered a verdict in the following form: "We, the jury, in the above-entitled case find the defendant, George Schweitzer, guilty of selling by short weights as charged in the complaint." The appellant attacks this verdict and insists that under the provisions of sec. 7929 of the Rev. Codes it is void for uncertainty and informality. That section of the statute reads as follows:

"If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict."

Counsel for appellant rely on *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *People v. Small*, 1 Cal. App. 320, 82 Pac. 87, and Bishop's New Criminal Procedure, sec. 1005, as sustaining his position that this verdict is faulty and is not sufficient on which to found a judgment of conviction. In *People v. Tilley* defendant was being prosecuted for receiving stolen property, knowing the same to have been stolen, and retaining it for his personal gain. The verdict of the jury was as follows: "We, the jury in the above-entitled cause, find the defendant, Charles M. Tilley, guilty of receiving stolen property." The court held the verdict insufficient and based it on the ground that the mere fact of receiving stolen property did not constitute a crime, but that it must be accompanied with the knowledge that it was stolen and an intent to derive personal gain from its detention. *People v. Small* follows the *Tilley* case and is to the same effect.

These cases are hardly parallel with the case at bar. Here the jury found the defendant "guilty of selling by short

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weights as charged in the complaint." The words, "guilty of selling by short weights," are found in the complaint or information, and, indeed, the complaint designates the offense as "the crime of selling by short weights as defined by sec. 7109 of the Penal Code." But the words, "of selling by short weights," might be treated as surplusage and still the verdict would be good, for then it finds the defendant "guilty as charged in the complaint." This position seems to be supported by abundant authority. (*People v. O'Callaghan*, 2 Ida. 156, 9 Pac. 414; *People v. McCarty*, 48 Cal. 559; *People v. Brady* (Cal.), 65 Pac. 823; *State v. Collyer*, 17 Nev. 275, 30 Pac. 891; *Wallace v. State*, 70 Tenn. (2 Lea) 29.) There can be no doubt of the intention of the jury in this case to find the defendant guilty as charged in the complaint. Where the intent of the jury is clear, the requirements of the statute are fully met. (*Kellum v. State*, 64 Miss. 226, 1 So. 174; *State v. Wilson*, 40 La. Ann. 751, 5 So. 52, 1 L. R. A. 795; *Cheek v. Commonwealth*, 87 Ky. 42, 7 S. W. 403; *Birdwell v. State* (Tex. Cr.), 20 S. W. 556.)

The next question presented by appellant is the sufficiency of the evidence to sustain the verdict and judgment. This was a prosecution under the provisions of sec. 7109, Rev. Codes, for selling lard by short weight. On the 21st of January of this year, Claude D. Mason, state chemist, accompanied by James H. Wallis, state dairy, food and sanitary inspector and ex-officio sealer of weights and measures, went to the shop of the Boise Butcher Co. and asked the defendant, who is president of the company, for a "three-pound pail of lard." The lard was passed over to Mason who paid for the same. He took it away and weighed it and found that the lard contained in the pail weighed two pounds nine and one-half ounces, and that the lard and bucket together weighed three pounds and three-fourths of an ounce. Mason and Wallis thereupon returned to the shop of the Boise Butcher Co. and weighed a large number of the lard cans and found that practically none of them contained the amount of lard, net, that they were rated to hold; in other words, that none of the three-pound cans contained three pounds of lard net.



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The same was true of the buckets of larger dimensions. On the other hand, they were all full weight by weighing lard and can together. Both Mason and Wallis testified that lard is an article which is commonly and generally sold in commerce by the pound, avoirdupois weight. It also appears from their testimony that at the time they returned to weigh some of this lard, they had a conversation with Schweitzer in which he told them that his firm made no claim and did not presume to sell lard by the pound, that they only sold it by the bucket—a small bucket called a three-pound bucket and the next size, a five-pound bucket—and that they sold by the gross weight and charged so much per bucket. The defendant did not testify himself and did not produce any evidence on his part whatever. In this condition of the case with both the witnesses for the state testifying that lard is an article which is commonly and generally sold by the pound and not by the bucket, the jury were, under the evidence, justified in returning a verdict against the defendant.

It is next contended by appellant that the court erred in the instructions he gave to the jury and likewise in refusing to give certain instructions requested by the defendant. We have examined these instructions with some care and we find no serious objection to any of them except No. 6 given by the court on his own motion. That instruction is erroneous, and with the evidence as it stood before the jury, it practically amounted to an instruction for the jury to return a verdict against the defendant. That instruction is as follows:

“No. 6. If you find that lard is a substance sold in commerce by avoirdupois weight, then you are instructed that when Claude D. Mason asked the defendant for a three-pound pail of lard, if he did so ask him, he must be taken to have meant and the defendant must be taken to have understood that Mason, the purchaser, was to receive three pounds of lard irrespective of the weight of the pail, unless at the time of the sale there was in existence in Boise City a custom or usage of trade which was either known to Mason, or was so generally understood among both merchants and customers alike that it was a matter of common knowledge in the com-

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munity, that by a three-pound pail of lard was not meant a pail containing three pounds of lard, but a package weighing three pounds.”

The vice of this instruction is that the court undertook to tell the jury what the prosecuting witness meant when he called for a “three-pound pail of lard,” and what the defendant must be deemed to have understood by that request. This was the very thing that the jury was called on to determine, and was one of the very essentials of the case. It was a question for the jury to determine whether Mason called for *three pounds of lard net or gross*. It is admitted that he took no bucket or other receptacle in which to get his lard, and he evidently did not expect to carry it home in his hand without bucket or wrapper. He must have expected to receive the lard in a pail, paper, or some other receptacle in which he could carry it home. (*Harris v. Allwood* (Eng.), 57 J. P. 7; 15 Mew’s Digest, 202, 203; *State v. Swift & Co.*, 84 Neb. 244, 120 N. W. 1127.)

The question was then presented to the jury as to whether the defendant in fact sold Mason three pounds of lard at twenty cents per pound for the total sum of sixty cents, or sold him a bucket of lard, which is commonly designated a three-pound pail of lard, for the sum of sixty cents, gross. If the purchaser understood that he was paying twenty cents per pound for lard and that he was getting three pounds net for which he paid sixty cents, then he must have thought he was getting a bucket extra. If, on the other hand, the seller was representing that he was selling three pounds of lard for sixty cents and furnishing the receptacle in which to carry it, then he was clearly guilty of a violation of the statute under which he was being prosecuted, and it would have been the duty of the jury to convict him. Under the statute a vendor cannot sell two pounds nine and one-half ounces for three pounds, and if he does so, he is criminally liable. It was not proper, however, for the court to place a construction on the language employed between the vendor and purchaser and tell the jury what his construction was of the language used. That was a question for the jury to determine as to

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Points Decided.

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what the parties did and understood they were doing. The latter part of the instruction which tended to modify the foregoing portion or to point out an exception thereto did not cure the error in the former part; it rather tended to accentuate what the judge conceived to be the meaning of the expression, "a three-pound pail of lard."

The statute, sec. 7109, Rev. Codes, under which this prosecution was had, was clearly intended to require the vendors of the articles therein designated to sell the full weight for which they charge and to hold them criminally liable for selling to a purchaser an article of commerce which does not weigh the amount he represents it to weigh and that the purchaser understands he is buying. The statute is wholesome and deserves to be enforced. On the other hand, before one is convicted and sentenced criminally, the evidence ought to be clear that the crime has been committed, and the jury ought to be given a full opportunity for considering the facts and circumstances under which the offense is alleged to have been committed.

For the error above pointed out the judgment must be *reversed* and a new trial is ordered.

Sullivan, C. J., concurs.

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(November 11, 1910.)

BENJAMIN WALDRON, Appellant, v. EVAN JENKINS,  
Respondent.

[111 Pac. 745.]

DAMAGES—ESTABLISHMENT OF PRIVATE ROAD—JUDGMENT OF COURT—  
RES ADJUDICATA—PROVING DEDICATION.

(Syllabus by the court.)

1. A former judgment adjudging that a certain private road has been dedicated to the public is *res adjudicata* as between the parties to such action.
2. *Held*, that said former action was not brought for the purpose of laying out and creating a new road, but was brought for

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Argument for Respondent.

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the purpose of adjudicating the question whether said road had been dedicated to the use of the public.

3. As the parties plaintiff and defendant are the same in the action at bar and in the action referred to, the judgment as between them is *res adjudicata*.

APPEAL from the District Court of the Fifth Judicial District, for Oneida County. Hon. Alfred Budge, Judge.

Action to recover damages for leaving open certain gates. Judgment for defendant. *Affirmed*.

E. G. Davis, and T. D. Jones, for Appellant.

The first action was brought to determine the question as to whether or not the respondent had a right to travel over the premises of the appellant, on a road which he and others had used for more than thirty years. It is admitted that he had, and the court in decreeing his right of way erroneously, as we contend, denominated this private way a *private road*. It is admitted that the question as to the existence of this right of way in respondent's favor is *res judicata*, but not the question as to whether or not the road in question is a *private road*. Since the court could not lawfully create a *private road* by judicial decree, that part of the judgment which declared the road in question to be a *private road* should be treated as a mere nullity, and the decree ordered amended to conform to the facts.

The original action was brought to establish a right of way, and the question as to whether or not the particular road was a private road was not one of the issues of the case.

"A judgment upon matter not in issue is not conclusive, and may be inquired into collaterally." (*McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161; *Doonan v. Glynn*, 28 W. Va. 715; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Munday v. Vail*, 34 N. J. L. 418; *Campbell v. Consalus*, 25 N. Y. 613; *Springer v. Bien*, 32 N. Y. St. Rep. 63, 10 N. Y. Supp. 430.)

D. C. McDougall, for Respondent.

The court had before it its own findings and decree entered at the previous term of court over the same subject matter

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and between the same parties. The offers of the appellant of proof which would tend to prove the same questions which had been determined in the previous case were incompetent and immaterial, and were properly excluded from the record.

SULLIVAN, C. J.—This action was brought to recover damages alleged to have been caused by the unlawful tearing down and leaving open of certain gates on a private road in Oneida county. The cause was tried by the court without a jury and judgment was entered in favor of the defendant. The appeal is from the judgment.

It appears from the record that the road referred to had been established in 1877 by several owners of land bordering thereon, was twenty-one feet in width, and that gates had been maintained thereon; that said road had not been established by an order of the board of county commissioners. It also appears that a controversy had arisen in regard to said road between the appellant and the respondent, as a result of which an action was instituted by the respondent in this action as plaintiff against the appellant as defendant, in the district court of Oneida county, in 1906, and the court made its findings of fact and conclusions of law, and entered judgment in said action in favor of the plaintiff in that action. In that action the court found "that the plaintiff and the defendant and the public have continuously, openly and adversely continued to travel the said road at all times up to October, 1906; and that at all times since the year 1877 the plaintiff and all the public have traveled said road under claim of right, and that the defendant was at all times residing within one-half mile thereof and knew of the said use of the plaintiff; that the plaintiff and the other users of the said road have expended considerable sums in labor in repairing, grading and filling and bridging on said road, and entered judgment on the 9th day of February, 1907, as follows:

"Now, therefore, by reason of the law and the evidence, it is ordered, adjudged and decreed that those certain premises described as follows, to wit: A certain road inclosed in a lane, the center line of which is beginning at a point 80 rods

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north of the center of Sec. 14, in Township 15 S. R. 35 E. B. M., and running thence north  $1\frac{1}{4}$  miles, and being of a width of 21 feet, is a private road; and that the plaintiff is at all times entitled to the free and uninterrupted use of the same for traveling and stock and farm purposes.

"It is further ordered, adjudged and decreed that the defendant and his agents and servants be and they are forever enjoined and restrained from obstructing the plaintiff's free use of said lane and road, and that the plaintiff have and recover from the defendant his costs of suit amounting to \$52.15."

That judgment was not appealed from, and is a valid and subsisting judgment between the parties thereto, and as they are the respective parties to this action, that judgment is *res adjudicata* as to them.

Counsel for appellant contends that a private road cannot be established by a decree of court, and can only be laid out in the manner prescribed by statute, and that the court had no jurisdiction whatever in the action referred to to declare said road to be a private road.

The court by that decree did not undertake to establish a private road by decree of court. That suit was not brought for the purpose of laying out and creating a new road, but was brought for the purpose of adjudicating whether the road in question had been laid out, established and dedicated to the public many years before that action was instituted. The court by that decree did not undertake to establish said road, but simply found as a fact that in the year 1877 the plaintiff and defendant and other land owners, by common consent, had dedicated said road, twenty-one feet in width, to the use of the public, and that at all times since that year the plaintiff and the public had traveled said road under a claim of right. As the plaintiff in this action was a party to that suit and the judgment in that case is a valid and subsisting judgment, he is bound by it.

While the court has no authority to establish a road by decree, it had the jurisdiction to determine whether certain acts of parties resulted in the establishment or dedication of

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Argument for Appellant.

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a public road. In the former action, the court held that said road had been dedicated to the public by the acts of the owners, and the parties to that action are bound by that judgment.

The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Ailshie, J., concurs.

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(November 12, 1910.)

STATE, Respondent, v. FRED HARRIS, Appellant.

[111 Pac. 406.]

CRIMINAL LAW—BURGLARY—INSUFFICIENCY OF EVIDENCE—REQUESTED INSTRUCTIONS—INSTRUCTIONS GIVEN BY COURT ON ITS OWN MOTION—EXCEPTIONS TO.

(Syllabus by the court.)

1. The evidence *held* sufficient to support the verdict.
2. Where no exception is taken to the introduction of certain evidence and the admission thereof is not specified as error in the assignment of errors in appellant's brief, the admissibility of such evidence will not be passed upon on appeal.
3. *Held*, that the court did not err in refusing to give certain instructions requested by the defendant.
4. Under the provisions of sec. 7940, Rev. Codes, instructions given by the court on its own motion will not be reviewed on appeal unless exception thereto is duly taken and embodied in a bill of exceptions.

APPEAL from the District Court of the Third Judicial District of Ada County. Hon. Fremont Wood, Judge.

Defendant was convicted of the crime of burglary. Verdict and judgment sustained.

G. G. Adams, and Harry Keyser, for Appellant.

When the circumstances upon which a verdict is based can be as reasonably explained upon some other reasonable hy-

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pothesis than that of the defendant's guilt, or as perfectly consistent with the defendant's innocence, then a new trial should be granted. (*State v. Nesbit*, 4 Ida. 548, 43 Pac. 66; *State v. Marquardsen*, 7 Ida. 352, 62 Pac. 1034.)

To authorize a conviction on circumstantial evidence alone, the facts and circumstances shown by the evidence must be incompatible upon any reasonable hypothesis with the innocence of the accused. (*State v. Levy*, 9 Ida. 483, 75 Pac. 227.)

Mere suspicions or probabilities, however strong, are insufficient to convict of crime. There must be substantial testimony. (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; 14 Cent. Dig. 1263-1266.)

D. C. McDougall, Attorney General, J. H. Peterson, and O. M. Van Duyn, Assistants, for the State, cite no authorities.

SULLIVAN, C. J.—The defendant with three other defendants was charged with the crime of burglary alleged to have been committed on November 29, 1909. Upon arraignment the defendants demanded separate trials, which were granted, and upon the trial of defendant Harris, he was found guilty as charged in the information, and was thereafter, on December 4th, 1909, sentenced by the court to be confined in the state penitentiary for a term of not less than ten years nor more than twenty-five years. A motion for a new trial was overruled, and this appeal is from the judgment and order denying a new trial.

The errors relied on go to the insufficiency of the evidence to justify the verdict, the refusal of the court to give certain instructions requested by the defendant, and to certain instructions given by the court on its own motion.

It is contended by counsel for appellant that the evidence fails to identify the defendant as one of the persons who committed the offense charged in the information, and fails to connect the defendant with such crime, and that the evidence, taken as a whole, shows that the jury in arriving at a verdict accepted the conclusions of the witnesses in regard to the circumstances surrounding the crime charged, and based their



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verdict upon such conclusions and not upon the facts and circumstances related by the witnesses.

We have carefully examined all of the evidence contained in the record, and find that it sufficiently identifies the defendant as one of the persons who committed the offense charged in the information and connects him with such crime, and that the evidence is sufficient to sustain the verdict of the jury.

Some question was raised on the oral argument as to the admissibility of certain evidence showing certain admissions made by the defendant. On an examination of the record, we find that no objection was made to that evidence and no exception taken to its introduction, and the admission of such evidence was not specified as error in the brief of appellant. This court is therefore not authorized to pass upon the admissibility of such evidence on this appeal.

As counsel for appellant have failed in their brief or in their oral argument before the court to point out or suggest any reasons why the court erred in refusing to give certain instructions requested by the defendant, for that reason alone we would be justified in not considering the specifications of error in regard to the refusal of the court to give the instructions requested by defendant. But upon an examination of those instructions, we find that the court did not err in refusing to give them.

As to the instructions given by the court on its own motion, this court held in *State v. Suttles*, 13 Ida. 88, 88 Pac. 238, that under the provisions of sec. 7940, Rev. Codes, a defendant is required to take exceptions to any and all instructions given by the court on its own motion that he deems prejudicial to him or contrary to law, and such exceptions must be embodied in a bill of exceptions in order to be reviewed on appeal. (See, also, *State v. Peck*, 14 Ida. 712, 95 Pac. 515.) As there were no exceptions taken to any of the instructions given by the court on its own motion, this court cannot review those instructions on this appeal.

Finding no error in the record, judgment must be affirmed, and it is so ordered.

Ailshie, J., concurs.

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Argument for Appellants.

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(November 14, 1910.)

GUS JOHNSON, Respondent, v. JOHN GARY and JOHN WEEKS, Copartners, Appellants.

[111 Pac. 855.]

MASTER AND SERVANT—PERSONAL INJURIES—SPECIAL DAMAGES—ALLEGATIONS OF COMPLAINT—PLEADINGS AND PROOF—VARIANCE IN—INSTRUCTIONS—REFUSAL TO GIVE—EVIDENCE—SUBSTANTIAL CONFLICT.

(Syllabus by the court.)

1. Where it is alleged in the complaint that because of the personal injury received, a total loss of earning capacity resulted, and that such injury was the result of the negligence of the defendants, a cause of action is stated, and in such a case the amount of damages sustained depends on the nature of the injury. If the evidence introduced, without objection, established the allegations as to bodily pain, mental anguish and incapacity to earn money, the jury would be justified in finding a verdict for the plaintiff.

2. Under the provisions of sec. 4226, Rev. Codes, no variance between the allegation and the proof is deemed to be material unless it has actually misled the adverse party to his prejudice, and whenever there is such variance, it is the duty of the adverse party to make seasonable objection on that ground, and if objection is not made, it cannot be raised for the first time either on motion for a new trial or on appeal.

3. *Held*, that the instruction given by the court fairly covered the case and substantially included all of the proper instructions requested by appellants.

4. *Held*, that there was a substantial conflict in the evidence, and that the evidence was sufficient to sustain the verdict.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action to recover for personal injuries alleged to have been caused through the negligence of the defendants. Judgment for the plaintiff. *Affirmed*.

Hawley, Puckett & Hawley, for Appellants.

As a general rule, expenses incurred for medical attention, nursing, etc., cannot be recovered under the general allega-

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Argument for Respondent.

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tion of damages, but must be specially pleaded. (5 Ency. Pl. & Pr. 751, and note 2.)

Loss of earnings and loss of capacity to attend to business affairs are generally held to require a special averment to recover therefor. (*Silsby v. Michigan Car Co.*, 95 Mich. 204, 54 N. W. 761; *Chicago v. O'Brennan*, 65 Ill. 160; *Mellor v. Missouri R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *City of Pueblo v. Griffin*, 10 Colo. 367, 15 Pac. 616; *Tucker v. Parks*, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486; 5 Ency. Pl. & Pr. 753, and note 2.)

The allegations of the complaint as to grounds of damages are all in the past tense, and do not even inferentially allege or claim damages for future pain, mental anguish and suffering. The instruction complained of expressly states, "The jury may find for future pain, anguish and suffering," and this clause is united with the past pain and suffering. This is fatal error, and of itself must cause a reversal of the case. (*Shulz v. Griffith*, 103 Iowa, 150, 72 N. W. 445, 40 L. R. A. 117.)

Although the supreme court may be satisfied that the verdict of a jury is reasonable in amount, a new trial will be granted, when an erroneous instruction has been given by the district judge which may have influenced the verdict. (*Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 353; *Brown v. McAllister*, 39 Cal. 573; *Friedenberg v. Robinson*, 14 Fla. 130; *Goode v. State*, 16 Tex. App. 411.)

E. J. Frawley, and G. G. Adams, for Respondent.

Where permanent injuries have been alleged and sustained, all elements of damage, including future pain, anguish and suffering, medical attendance and nursing, and all damages which are the natural and uniform effects of the injury, may be shown, although not specifically alleged. (16 Ency. Pl. & Pr. 391-449; *Crank v. Railway Co.*, 53 Hun, 425, 6 N. Y. Supp. 229; *Chi. R. R. Co. v. Warner*, 108 Ill. 538; *Rienke v. Bentley*, 90 Wis. 457, 63 N. W. 1055; *Texas Ry. Co. v. Curry*, 64 Tex. 85; *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. 175, 22 Pac. 266, 5 L. R. A. 498; *Ratteree v. Chapman*, 79 Ga. 574,

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4 S. E. 684; *Wilson v. R. R. Co.*, 132 Pa. 27, 18 Atl. 1087; *Schmitz v. Railway Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352; *Hopkins v. Atlantic Ry. Co.*, 36 N. H. 9, 72 Am. Dec. 289; 2 Rorer on Railways, p. 1098; *Brown v. Hannibal R. Co.*, 99 Mo. 318, 12 S. W. 655; 5 Ency. Pl. & Pr. 754; *Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; *Tyson v. Booth*, 100 Mass. 258; *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. 50, 28 Pac. 752; 16 Ency. Pl. & Pr. 391-449.)

K. I. Perky, and John F. MacLane, *amici curiae*, cite no authorities on points decided.

SULLIVAN, C. J.—This action was brought to recover damages in the sum of \$20,000, alleged to have been incurred by reason of the defendants' furnishing the respondent, who was herding sheep for them, a defective gun known as an army musket, which exploded and so injured the plaintiff's left arm that it resulted in an amputation thereof; and to recover the further sum of \$75 for medical treatment for such injuries.

After alleging the copartnership of the defendants and the employment of the plaintiff by them to herd sheep, it is alleged that under the instructions of defendants it became plaintiff's duty to shoot off and fire a gun at intervals while in charge of said sheep, for the purpose of driving away wild animals; that it was the duty of the defendants to furnish plaintiff a safe and reliable gun to carry out such instructions; that the defendants furnished plaintiff a gun for that purpose that was defective, unsafe and dangerous, and was so known to be by the defendants at the time of giving it to plaintiff, and that while in the discharge of such duties, and on April 4, 1908, and without the knowledge of the defects or unsafe condition of such gun, the plaintiff shot the same off in the performance of his duty, and that the said gun exploded in his hands and shattered his left arm to such a degree that it had to be amputated; that by reason of such injury he was crippled and maimed, and became permanently unfit and

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incapable of earning a livelihood, and that such injuries were due to the negligence and want of care and precaution on the part of defendants and their agents; that plaintiff at the time of said accident was forty-eight years of age, strong and able-bodied and capable of earning \$100 per month; that by reason of such injury his earning capacity had been entirely destroyed; that he was damaged in the sum of \$20,000 and \$75 in addition paid for medical treatment, and prayed for judgment in the sum of \$20,075.

To this complaint, the defendants, who are appellants here, interposed both a general and special demurrer, which were overruled by the court and defendants answered. They admitted the partnership of defendants, the hiring of plaintiff, but averred that he was simply employed as a herder under the order and direction of a foreman; denied that it was the plaintiff's duty to shoot off a gun at intervals, or at any time, or that it was the duty of the defendant to furnish the plaintiff with a gun, and denied that any gun was furnished plaintiff in the discharge of his duties as herder; denied that there was any defect in said gun or that it was exploded in plaintiff's hands while in the performance of his duty; denied that he was injured by reason of any negligence or want of care or precaution on the part of the appellants or their agents; denied that plaintiff was an able-bodied man and capable of earning \$100 per month; denied the claim of damages *in toto*, and averred that plaintiff of his own volition, and contrary to the custom of persons engaged in the care and custody of sheep, and without any instructions from appellants, took said gun belonging to appellants and loaded it to excess and fired it off in an unusual way, and by reason of his own negligence and misdoing caused the injury from which he suffered.

The case was tried by the court with a jury. The jury found a verdict for the respondent and assessed his damages at \$2,000. A motion for a new trial was denied, and the appeal is from the judgment and order denying a new trial.

The overruling of the demurrer to the complaint is assigned as error, also the giving of certain instructions and the refusal to give others, the insufficiency of the evidence to justify

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the verdict, and the admission and rejection of certain testimony.

The court did not err in overruling the demurrer. It is first contended by counsel for appellants that the special demurrer, at least, should have been sustained by the court, for the reason that the complaint does not ask general damages by reason of the accident complained of, but asks for special damages for loss of earnings and money paid for medical treatment. The complaint alleges total loss of earning capacity, and prays for judgment on that account for \$20,000, and alleges that he expended \$75 for medical treatment. These allegations go to special damages. No special facts are averred on which to base the allegation that the loss of his arm totally destroyed his earning capacity. We are aware that it is held by very respectable authority that loss of earnings and loss of capacity to earn are held to require special averments therefor. (5 Ency. Pl. & Pr. 752, and note; 16 Ency. Pl. & Pr. 391, 449; *Mellor v. Mo. R. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Chicago v. O'Brennan*, 65 Ill. 160.) Good pleading requires the pleader to make such allegations as will apprise the opposite party of the nature of his claim and prevent surprise. In the case at bar, the gravamen of the claim alleged was the injury inflicted on plaintiff through defendants' negligence. The damages are the result of the injury thus caused. They are not the cause of action; they are simply collateral to it. When the plaintiff proved his injury caused by defendants' negligence, he was entitled to recover something. The amount of the damages sustained must depend on the nature of the injury. It must be conceded that if he proved the allegations of his complaint, he was entitled to compensation in damages for bodily pain and mental anguish as well as for permanent injury. No objection was made to the introduction of evidence as to his permanent disability, so the question of the necessity of allegations of special damages does not arise in this case. It is provided by sec. 4226, Rev. Codes, that no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his

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prejudice in maintaining his action or defense upon the merits; and whenever it appears that the party has been misled, the court may order the pleading to be amended upon such terms as may be just. Wherever there is a variance between the allegation and the proof that has actually misled the adverse party, it is his duty to make seasonable objection on that ground. It was held by this court in *Aulbach v. Dahler*, 4 Ida. 654, 43 Pac. 322, that such objection cannot be raised for the first time on motion for a new trial or on appeal to the supreme court. It is not contended in this case that any objection was made during the trial of the case, or at all, to the effect that special damages could not be proved under the allegations of the complaint. It is clear from the record that the jury did not give plaintiff the amount of damages he would have been entitled to for total disability. It appears that plaintiff was forty-eight years old and, according to the American table of mortality, the expectancy of life of such a person is 22.36 years, and as the jury only rendered a verdict for \$2,000, it is clear that they did not render their verdict on the basis of total disability or total loss of earning capacity.

It is next contended that the court erred in refusing to give certain instructions asked by the defendants. We have examined those instructions, and in the most of them find the law correctly stated. On an examination of the instructions given by the court, we find that they fairly cover the case, and substantially include all proper instructions requested by appellants.

The insufficiency of the evidence to justify the verdict is assigned as error, and after a careful consideration of the evidence, we are satisfied that it is sufficient to sustain the verdict. There is a substantial conflict in the evidence in some material matters, and there appears to be uncertainty as to the date when the injury occurred, but from all of the evidence we are not able to say that the jury did not arrive at a correct verdict.

The judgment is therefore affirmed, with costs in favor of the respondent.

Ailshie, J., concurs.

Points Decided.

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(November 15, 1910.)

**BONHAM NATIONAL BANK OF FAIRBURY, Respondent, v. GRIMES PASS PLACER MINING CO., LTD., Respondent, and EZRA E. HOWARD and I. V. HOWARD, Appellants.**

[111 Pac. 1078.]

**DEFECT OR MISJOINDER OF PARTIES DEFENDANT—JOINT LIABILITY—DEMURRER—FOREIGN CORPORATION—DOING BUSINESS IN THIS STATE—PLEADING BY FOREIGN CORPORATION—SUIT ON FOREIGN CONTRACT—GENERAL DEMURRER TO SEVERAL CAUSES OF ACTION.**

(Syllabus by the court.)

1. Where a contract pleaded *in haec verba* shows on its face a joint and several liability against the defendants and another party who is not made a party defendant, the defect in naming parties defendant, if any exists, cannot be raised by general demurrer going to the sufficiency of the complaint, but must be raised by special demurrer on the grounds of defect or misjoinder of parties defendant.

2. The prosecution of an action in this state for the collection of a debt contracted in another state, and payable in that state, does not constitute "doing business" in this state within the meaning of the constitution (sec. 10, art. 11) and the statute (sec. 2792, Rev. Codes).

3. Where a foreign corporation commences an action in this state and discloses upon the face of its pleading that it is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business within the state or else show by the facts constituting its cause of action that the contract sued upon does not arise out of a domestic transaction or by reason of doing any business within this state. If, therefore, the contract sued upon shows upon its face that it is a foreign contract, and that it did not arise out of domestic business or a domestic transaction, the complaint will not be demurrable on account of the failure of the plaintiff to show compliance with the foreign corporation laws of this state.

4. Where a complaint contains several causes of action separately stated, and the demurrer is a general demurrer directed against the complaint as a whole and not against any separate cause of action, it should be overruled if any one of the causes of action is well pleaded.



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Argument for Respondent.

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APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Fremont Wood, Judge.

Action on two several promissory notes. Judgment for plaintiff and defendants Howard appeal. *Affirmed.*

Jackson & Taylor, for Appellants.

In matters of contract, a foreign corporation cannot transact business in this state nor maintain actions at law in this state in relation to such contracts before complying with the constitution and laws of the state, and can maintain no action on contract created before such compliance. (*Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *Valley Lumber etc. Co. v. Driessel*, 13 Ida. 662, 93 Pac. 765, 15 L. R. A., N. S., 299, 13 Ann. Cas. 63; *Valley Lumber Co. v. Nickerson*, 13 Ida. 682, 93 Pac. 24; *Kiesel v. Bybee*, 14 Ida. 670, 95 Pac. 20; *Tarr v. Western Loan & Savings Bank*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707.)

The statute (sec. 2792) does not say *contracts* or *agreements*, or business *transactions*, but uses the singular, "*contract* or *agreement*," evidently intending that one act is just as offensive as many by the outlaw corporation. (5 Thompson on Corporations, sec. 6718; *Central Mfg. Co. v. Briggs*, 106 Ill. App. 417.)

Appellants having raised by special demurrer the lack of capacity on part of plaintiff to sue, and it appearing on the face of the complaint that plaintiff is a foreign corporation, appellants have pleaded within the well-settled rule of decision by this court. (*Valley Lumber Co. v. Driessel*, *supra*; *Kiesel v. Bybee*, *supra*.)

C. S. Polk, for Respondent.

A misjoinder or nonjoinder of parties defendant could not be raised by general demurrer, and if the point had been raised by special demurrer, it would not have been well taken. (*Decker v. Trilling*, 24 Wis. 610; *People v. Love*, 25 Cal. 521.)

If the complaint showed on its face that the action was based on a single transaction, a contract executed without the

Argument for Respondent.

state, or in the line of interstate commerce, and did not allege that complainant was "doing business" within the state, it would not be demurrable. The complainant was not "doing business" in the state of Idaho and the complaint contains no allegation that it was.

Foreign corporations can sue in this state, although not having complied with the statutes with reference to foreign corporations doing business in this state, where the business was interstate commerce. (*Foore v. Simon Piano Co.*, 18 Ida. 167, 108 Pac. 1039; *Toledo Computing Scale Co. v. Young*, 16 Ida. 187, 101 Pac. 257.)

A single transaction is not "doing business" within the inhibition of a statute requiring foreign corporations to perform certain things before "doing business" within the domestic state. (*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. ed. 1137; *Ladd Metals Co. v. Am. Min. Co.*, 152 Fed. 1008; *Caesar v. Capell*, 83 Fed. 403; *Gilchrist v. Helena H. S. & B. R. Co.*, 47 Fed. 593; *Babbitt v. Field*, 6 Ariz. 6, 52 Pac. 755; *Florsheim Bros. Dry Goods Co. v. Lester*, 60 Ark. 120, 46 Am. St. 162, 29 S. W. 34, 27 L. R. A. 505; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Colo. Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. 433, 25 Pac. 325; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740; *W. H. Lutes Co. v. Wysong*, 100 Minn. 112, 110 N. W. 367; *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496, 75 S. W. 633; *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A., N. S., 127, and note; *Del. & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538.)

Where it does not appear that the corporation is doing business in the state, it need not, in the first instance, either allege or prove compliance with acts relating to corporations doing business within the state. (*Brown v. Guarantee Sav. Loan & Inv. Co.*, 46 Tex. Civ. App. 295, 102 S. W. 138; *Norton v. Thomas & Sons Co.* (Tex. Civ. App.), 93 S. W. 711.)

Taking assignment of valid claims against residents of state and suing thereon is not doing business by foreign corporation. (*A. Booth & Co. v. G. M. Weigand*, 30 Utah, 135, 83

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Pac. 734, 10 L. R. A., N. S., 693; *Keene etc. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680.)

A statute prescribing conditions on which foreign corporations may do business in the state does not prohibit such corporations from maintaining actions in the state founded on contracts made in other states. (*Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507; *Powder River Cattle Co. v. Custer County*, 9 Mont. 145, 22 Pac. 383; *Derringer v. Derringer*, 5 Houst. (Del.) 416.)

Compliance with state laws is not essential to the right to sue on contracts made in other states. (*Robinson v. Am. Linsced Oil Co.*, 147 Fed. 885; *Union Sav. Bank & Trust Co. v. Baltimore etc. R. Co.*, 7 Ohio N. P., N. S., 497; *Lilly-Brackett Co. v. Sonneman*, 50 Wash. 487, 97 Pac. 505; 5 Thompson, Corp., sec. 6716.)

The institution and prosecution of a suit does not constitute doing business within the meaning of constitutional and statutory provisions against doing business in a state without compliance with certain requirements. (*Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369; *St. Louis O. & T. R. Co. v. Phila. Fire Assn.*, 55 Ark. 163, 18 S. W. 43, and cases cited in notes to 24 L. R. A. 289.)

AILSHIE, J.—This action was instituted to recover judgment on two promissory notes. The defendants Howard appeared and filed a demurrer. The demurrer was overruled and they declined to answer, and judgment was thereupon entered against them. This appeal is from the judgment.

The complaint was filed against the Grimes Pass Placer Mining Co., Ezra E. Howard and I. V. Howard as defendants, and contains two causes of action separately stated.

The first cause of action was on a promissory note for the sum of \$500 dated at Fairbury, Neb., September 16, 1908, payable to the order of Bonham National Bank of Fairbury, and payable at the Bonham National Bank at Fairbury, Neb. The note was pleaded *in haec verba*, and the copy set out in the pleadings showed the note to have been signed by one A. E. Woodman in addition to the signatures of the defendants in this action. The allegation of the complaint which imme-

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diately precedes the copy of the note is as follows: "That the defendants on or about September 16th, 1908, jointly and severally made, executed and delivered to the plaintiff their promissory note in writing in words and figures as follows, to wit." It is contended by the appellant that the demurrer should have been sustained, for the reason that the note set out in the complaint is not the contract sued upon, for the reason that it purports to be a note signed by the defendants and Woodman instead of a note signed by the defendants as alleged by the foregoing quotation from the complaint.

This objection is not well taken. Although the copy of the note pleaded contained the name of another maker, that fact did not change the liability of the defendants sued. They were still jointly and severally liable for the payment of the note, and the fact that Woodman was also jointly and severally liable with them did not change or alter the liability of the other makers or make them any less jointly and severally liable as between themselves and the holder of the note. (See sec. 4147, Rev. Codes.) The demurrer was taken on the ground of insufficient facts to constitute a cause of action, and not on grounds of "defect or misjoinder of parties defendant." The complaint does state a "cause of action" against these defendants just as fully as it would be stated if Woodman had been joined as a party defendant. If there is a defect or misjoinder of parties defendant, that question should have been raised by demurrer on that ground (subd. 4, sec. 4174, Rev. Codes), and a failure to do so is a waiver of such ground. (Sec. 4178, Rev. Codes.)

The second cause of action was on a promissory note for the sum of \$500, executed at Boise, Idaho, November 3, 1908, payable to the order of John A. Green, and this note was set out in full, and appears to have been signed by one G. T. Joslin in addition to the defendants herein named. The same objection is made to this cause of action as to the first cause of action, on the ground that the note pleaded was executed not only by the defendants, but that Joslin had joined them as a joint and several maker. What we have said with reference to the first cause of action disposes of this question.

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The demurrer alleged the further ground "that the plaintiff has no legal capacity to sue," for the reason that the complaint shows that plaintiff is a foreign corporation, and that it does not allege a compliance by plaintiff with the foreign corporation laws of this state. The argument in this connection involves a somewhat complex proposition. While the complaint alleges that the plaintiff is a foreign corporation, and does not allege that it had in any way complied with the laws of this state with reference to foreign corporations doing business in this state, still it nowhere directly alleges that the plaintiff was, or ever had been, doing business in this state. If that fact has in any way been pleaded, it must be gathered from the general allegations of the complaint which show the nature of the contract and the transaction on which the cause of action is based. The first cause of action is clearly a Nebraska contract which was executed in Nebraska and was to be performed in Nebraska. Under such circumstances we have no doubt but that the payee, if it finds it necessary, may come to this state and prosecute its action for the collection of the debt. The mere prosecution of an action for the collection of a debt contracted in another state and payable in another state is not "doing business" in this state within the meaning of the constitution (sec. 10, art. 11) and the statute (sec. 2792) of this state. (*Toledo Computing Scale Co. v. Young*, 16 Ida. 187, 101 Pac. 257; *Foore v. Simon Piano Co.*, 18 Ida. 167, 108 Pac. 1038.)

This case presents a new question with reference to a foreign corporation pleading compliance with the laws of this state in order to maintain an action in the courts of the state. We have heretofore held that where a plaintiff shows by its pleading that it is a foreign corporation, its complaint will be open to demurrer unless it further pleads a compliance with the constitution and laws of this state entitling it to do business in the state. (*Valley Lumber Co. v. Driessel*, 13 Ida. 662, 93 Pac. 765, 15 L. R. A., N. S., 299, 13 Ann. Cas. 63; *Valley Lumber Co. v. Nickerson*, 13 Ida. 682, 93 Pac. 24; *Kiesel v. Bybee*, 14 Ida. 670, 95 Pac. 20.) In those cases, however, the complaint alleged that the corporation was "doing business" in

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this state. In the complaint in this case, no such allegation is to be found. The reason for the rule previously announced by this court would lead to the inevitable conclusion, however, that if the complaint shows that the plaintiff is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business in this state, or show by the facts constituting its cause of action that the transaction sued on does not arise out of "doing business within this state." If, therefore, the contract sued upon shows upon its face, as in the first cause of action in this case, that it is a foreign contract and that it did not arise out of domestic business or a domestic transaction, the complaint is not demurrable on account of the failure of the plaintiff to show compliance with the state law. If, on the other hand, the cause of action sued upon or the facts pleaded do not show a transaction or a contract such as would exempt the corporation from complying with the state laws, it should plead compliance, or its complaint will be subject to demurrer.

The transaction set up in the second cause of action presents a different situation from that presented by the first cause of action. There the contract is an Idaho contract. It does not appear from the face of the complaint whether the plaintiff procured the note in due course of business at its banking-house in Nebraska or purchased it within this state in the transaction of business here. Another peculiar feature about it is that the complaint does not allege that the plaintiff is the owner and holder of this note, but rather alleges that "on or about December 13, 1909, said John A. Green by written indorsement assigned said note to this plaintiff." We are not advised by this allegation whether the plaintiff is the owner of the note or is merely an assignee for collection. If the plaintiff is acting as a collection agent against the people of this state, that would amount to "doing business" within the meaning of the statute and constitution as much as if it were engaged in any other business in this state. We are, however, not required to pass on this phase of the question, for the reason that the demurrer was not taken to the causes of action separately but goes to the whole complaint,

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Points Decided.

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and the rule is that where a demurrer is lodged against a complaint generally which contains several causes of action, if any one of the causes of action will withstand the assault of the demurrer, then the demurrer should be overruled. (*As evado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402; *Pomeroy's Remedies and Remedial Rights*, sec. 577.)

For these reasons the judgment must be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, C. J., concurs.

Petition for rehearing denied.

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(November 17, 1910.)

TILLMAN BELL, Appellant, v. M. ALBERTA BELL, Respondent.

[111 Pac. 1074.]

CHANGE OF VENUE—PREJUDICE—SHOWING.

(Syllabus by the court.)

1. Where a party moves in the district court for a change of place of trial, on the grounds of the prejudice of the judge, it is not sufficient for him to state that "he has good reason to believe, and does believe, that he cannot have a fair and impartial trial," etc., but he must state the facts upon which he predicates his charge of prejudice and claims the right of a change of place of trial.

2. The prejudice of a judge contemplated by the constitution (sec. 18, art. 1) is a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the presiding judge could or would give the litigant a fair and impartial trial in the particular case pending.

APPEAL from the District Court of the Second Judicial District, in and for the County of Nez Perce. Hon. Edgar C. Steele, Judge.

Appeal from an order granting a change of the place of trial on the grounds of the prejudice of the judge. *Reversed.*

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Argument for Respondent.

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F. E. Fogg, for Appellant.

Except under statutes expressly authorizing change of venue upon the filing of an affidavit by a party that he believes he cannot have a fair trial on account of the bias or prejudice of the judge, or some like provision, an affidavit of belief merely is insufficient.

An apprehension of a party that a judge is prejudiced against him is not sufficient for a change of venue. It must satisfactorily appear that prejudice in fact exists. (*In re Smith*, 73 Kan. 743, 85 Pac. 584; *De Walt v. Hartzell*, 7 Colo. 601, 4 Pac. 1201; *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129; *Toledo R. R. Co. v. Eddy*, 72 Ill. 138; *Western Bank of Scotland v. Tallman*, 15 Wis. 92.)

Prejudice cannot be predicated on the mere fact of a former adverse decision even upon identical questions of law and fact. (*In re Dolbeer's Estate*, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207, and cases cited; *State v. La Grange*, 94 Iowa, 60, 62 N. W. 664; *Purvis v. Frink*, 55 Fla. 715, 46 So. 171; *Doll v. Stewart*, 30 Colo. 320, 70 Pac. 326; *People v. Williams*, 24 Cal. 31.)

Daniel Needham, for Respondent.

Under the laws of this state, the motion and the showing made before the trial court were sufficient to warrant the court in granting the change of venue herein, and there was no abuse of discretion on the part of the trial court in so doing.

Prejudice of the judge is a ground for a change of venue. (*Day v. Day*, 12 Ida. 556, 86 Pac. 531, 10 Ann. Cas. 260; *Gordon v. Conner*, 5 Ida. 673, 51 Pac. 747.)

No one was better qualified to determine the question presented by the motion herein than the presiding judge himself, using his own discretion in the matter, regardless of the amount of extrinsic evidence offered. (*Avila v. Meherin*, 68 Cal. 478, 9 Pac. 428; *Lynes v. Eldred*, 47 Wis. 426, 2 N. W. 557; *Challoner v. Boyington*, 86 Wis. 217, 56 N. W. 640.)

"The granting of a change of venue in a civil case is, to a great extent, within the discretion of the trial court; and,



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where it does not appear that such discretion was abused, or that any substantial right of the objecting party was materially affected by the change, the supreme court will not reverse an order of the district court granting such change, although it may not appear that the district court was clearly bound to grant the change." (*Waterson v. Kirkwood*, 17 Kan. 9; *Coffey v. Carthage*, 200 Mo. 616, 98 S. W. 562; *Multnomah County v. Willamette Towing Co.*, 49 Or. 204. 89 Pac. 389.)

AILSHIE, J.—This is an appeal from an order granting a change of venue. Prior to the time the case was called for trial, the defendant filed an affidavit as follows:

"M. Alberta Bell, being first duly sworn on oath, deposes and says that she is the defendant named in the above-entitled action, and has good reason to believe, and does believe, that she cannot have a fair and impartial trial in such action in said court on account of the prejudice of the judge thereof, the Hon. Edgar C. Steele; and the defendant makes this affidavit for the purpose of, and in support of, a motion for a change of the place of trial to some other judicial district of the state of Idaho where the cause complained of does not exist."

This affidavit was attached to a motion for a change of place of trial. The motion recited that it would be supported by the attached affidavit of defendant and "upon the files and records of this action, and also upon the findings of fact, conclusions of law and decree of the above-entitled court rendered in the case of *Bell v. Bell*, heretofore tried in this court, which findings, conclusions and decree are on file in the office of the clerk of the above-entitled court."

The motion came on for hearing, and the plaintiff resisted the same and filed objections thereto on the ground that the affidavit was insufficient, in that it did not recite the facts upon which the defendant relied to establish the existence of prejudice and bias on the part of the judge. The motion was granted and the cause was ordered transferred to Shoshone county for trial.

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This motion for change of venue on the ground of prejudice and bias of the judge was made under the authority of *Day v. Day*, 12 Ida. 556, 86 Pac. 531, 10 Ann. Cas. 260, heretofore decided by this court, in which the court held that under the provisions of section 18, article 1, of the state constitution, a judge cannot try a case wherein it is shown that he is prejudiced against one of the parties to the action. In the *Day* case it was held that although the prejudice and bias of the judge is not included within the grounds enumerated in sec. 3900, Rev. Codes, as a disqualification of the judge to sit at the trial of a case, still the constitution prohibits a judge trying a case under such circumstances, and that the constitutional provision is self-executing, and must be treated as a ground additional to those enumerated in sec. 3900.

The only question with which we are now confronted is to determine whether the affidavit filed by the party seeking a change of place of trial shall set forth the facts upon which he concludes that the judge is prejudiced and biased against him, or if it is sufficient for him to state merely his conclusion, as has been done in this case, that "he has good reason to believe, and does believe, that he cannot have a fair and impartial trial in such action on account of the prejudice of the judge." If the facts constituting prejudice must be set forth in the affidavit, then the judge may determine whether or not, as a matter of law, such facts constitute legal prejudice. It would also subject the party making the affidavit to the pains and penalties of perjury in case he swears falsely. If, on the other hand, an affidavit is sufficient which states that the moving party *believes* that he cannot have a fair trial on account of the prejudice of the judge, then the question as to what constitutes prejudice is left to the moving party, and he is constituted the sole judge as to whether or not the judge of the court is so prejudiced against him as to prevent his having a fair trial.

In some states they seem to have a statute providing for a change of place of trial when a party to the action "makes and files" an affidavit that he cannot have a fair trial on account of the prejudice and bias of the judge, and that he

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believes he cannot have a fair trial before the presiding judge. That is true in this state with reference to trials in justices' courts where the party "makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice by reason of the prejudice or bias of the justice." (Sec. 4126, Rev. Codes.) Under this statute all that is necessary to do is to file an affidavit that the party believes that he cannot have a fair and impartial trial before the justice on account of prejudice or bias. This, in substance, seems to be the rule in Oklahoma. There they have a statute (sec. 6647, Snyder's Compiled Laws of Okl.) which provides that if the party "makes affidavit that he cannot have a fair and impartial trial before the county judge by reason of the bias or prejudice of the judge," he shall be entitled to a change of place of trial or to another judge to try the case. (*Rea v. State* (Okl.), 105 Pac. 384.) In this connection it may be observed that the Oklahoma courts have uniformly cited, approved and followed the case of *Day v. Day*, from this court, as will be seen from an examination of the following cases: *State v. Brown* (Okl.), 103 Pac. 762; *Ex parte Ellis* (Okl.), 105 Pac. 184; *Rea v. State* (Okl.), 105 Pac. 384.

It has been argued in this case that the record in the case of *Bell v. Bell*, 15 Ida. 7, 96 Pac. 196, showed on its face that the presiding judge was prejudiced against the moving party in this case. This argument is based on the fact that in *Bell v. Bell* the trial judge decided against the respondent on the question of property rights, which is the subject of litigation in this particular case. It should be remembered, however, that the appellate court did not determine that the trial judge erred in his decision against respondent on the questions, either of law or fact, involved in this particular case. The original case of *Bell v. Bell* was disposed of on appeal on other grounds, and so it has never been determined whether the trial judge found correctly or incorrectly on the facts submitted to him on that phase of the case. The fact even that he may have erred would in no way establish bias or prejudice on his part. There was in fact no showing made that established prejudice on the part of the trial judge.

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Where the law requires that certain facts or a specified condition shall exist in order that a litigant may obtain any given relief, it stands to reason, and is consonant with the principles of justice, that he should disclose the facts to the court and the adversary party, and that the court should determine between the parties whether or not the requisite facts have been disclosed or condition shown which brings the party within the terms of the statute. It would generally be dangerous and unjust to allow either party litigant to determine within his own mind, secretly, as it were, that certain facts or circumstances exist which entitle him to the relief he seeks. All men have their peculiarities, and doubtless some temperamental elements of prejudice in their makeup. This may go to either a class of persons, a class of business, a custom of society or a principle of public policy, and the fact that they are elevated to the bench, while it may lessen the fault, will seldom eradicate it. Certain of those peculiarities or prejudices may, to the mind of the litigant, be sufficient to entitle him to a change of venue, and might convince him that he could not have a fair and impartial trial, but such reasons could not be accepted in law or by the courts or the public generally as constituting sufficient grounds for granting changes of venue, and dragging litigants and their witnesses from one county to another for the purpose of a trial. The prejudice contemplated by the constitution is a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the party could have a fair and impartial trial in the particular case pending.

We conclude that it is essential for a party moving for a change of venue on the ground of the prejudice of the presiding judge, to make and file his affidavit setting forth the facts upon which he predicates his charge of prejudice and claims his right of change of place of trial.

As indicated in *Day v. Day*, there are two methods of attaining the desired result in cases where the change of place of trial is sought on the grounds only of prejudice of the judge: one is to call in a judge from another district to try

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Points Decided.

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that particular case; and the other is to transfer the case to a county in another district. As suggested in the Day case, we think it is always better in this class of cases for the presiding judge to call in another judge to try the case than to transfer the cause.

The judgment is reversed and the cause remanded. Costs awarded to appellant.

Sullivan, C. J., concurs.

Petition for rehearing denied.

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(November 18, 1910.)

VILLAGE OF ILO et al., Appellants, v. W. J. RAMEY et al.,  
Respondents.

[112 Pac. 126.]

INCORPORATION OF VILLAGE—BOARD OF COUNTY COMMISSIONERS—APPEAL  
FROM ORDER OF—TAXPAYER—PUBLIC INTEREST—APPEAL TO JUDGE—  
TRIAL BY COURT—FINDING OF FACT—SUFFICIENCY OF EVIDENCE.

(Syllabus by the court.)

1. Under the provisions of sec. 1950, Rev. Codes, an appeal may be taken from any act, order or proceeding of the board of county commissioners by any person aggrieved thereby or by any taxpayer of the county when he deems any such act, order or proceeding illegal or prejudicial to public interest.

2. *Held*, under the provisions of said sec. 1950, that appellants had the right to appeal from an order of the board of county commissioners incorporating the village of Ilo.

3. Under the provisions of sec. 1951, Rev. Codes, an appeal may be taken to the district court or a judge thereof, and such appeal may be tried either by the court or the judge.

4. *Held*, that the evidence is not sufficient to sustain the finding of the court that there were not 200 actual residents within the corporate limits of said village at the time of filing the petition for incorporation and at the time of making the order of the board incorporating said town.

5. If a person has established an actual residence in a town or village, his temporary absence therefrom would not forfeit such residence.

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Argument for Appellants.

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6. The provisions of sec. 2222, Rev. Codes, authorizing the incorporation of a village must be liberally construed.

APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Proceeding involving the order of the board of county commissioners in incorporating the village of Ilo. Order reversed by the district court on appeal. *Reversed.*

G. Orr McMinimy, and Ben F. Tweedy, for Appellants.

"The word 'aggrieved' refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation." (*In re Mackay's Estate*, 44 Colo. 79, 102 Pac. 1088, 1089, 23 L. R. A., N. S., 1207.)

"In legal acceptance a party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly upon his interest." (2 Cyc. 633.)

Sec. 1950 evidently includes the words "or by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interest," because it had been held by numerous courts that such taxpayer had no right of appeal as the party "aggrieved," which holding is made by the following courts, to wit: *Chandler v. Railroad Commrs.*, 141 Mass. 213, 5 N. E. 507; *Carey v. Justices*, 5 Sneed (Tenn.), 515; *Obion County Court v. Marr*, 8 Humph. (Tenn.) 634; *Hunter v. Campbell County*, 7 Cold. (Tenn.) 49.

The only reasonable construction of sec. 1950 is that it extends to and confers upon "persons aggrieved" the right of appeal, and confers the right of appeal upon no person who is not aggrieved by the act, order or proceeding of the board, and who has no interest in the subject matter of appeal.

"Under such statutes the appellant must possess the same appealable interest in the subject matter as at the common law." (2 Ency. Pl. & Pr. 170, and authorities cited in note one (1).)

"The proceedings of the board of county commissioners, under the statute, in the incorporation of said town are com-

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Argument for Respondents.

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manded by said sec. 4 to be liberally construed with the view to effect the intended object." (*State v. Pocatello*, 2 Ida. 908, 28 Pac. 411; *State v. Steunenberg*, 5 Ida. 1, 45 Pac. 462.)

The legislature must have enacted sec. 2222 with reference to the judicial definitions of such words as "actual," "domicile," "inhabitant," "resident." For a full consideration of each of these words we cite the definitions of the courts: 7 Words & Phrases, commencing at page 6161, vol. 3, commencing at page 2168, vol. 1, commencing at page 151, vol. 3, at page 2179, "Domicile by Operation of Law."

The husband has the right and authority to choose the domicile for his wife and minor children, and wherever his domicile is shown to be, the law presumes that that is their domicile also. The husband, to change the domicile, need not move his family to his new domicile but may leave them in the former domicile temporarily. (14 Cyc. 855; 4 Ency. of Evidence, 851, 852.)

The absence from Ilo for purposes of business, pleasure, visiting, etc., will not change the "actual residence" in Ilo to the new abode. (14 Cyc. 841, 842.)

Chas. L. McDonald, for Respondents.

An appeal lies from an order of the board of county commissioners establishing a municipal corporation. (*Reynolds v. County Commrs.*, 6 Ida. 787, 59 Pac. 730; *School District No. 25 v. Rice*, 11 Ida. 99, 81 Pac. 155; *City of Wardner v. Pelkes*, 8 Ida. 333, 69 Pac. 64; *Gardner v. Blaine County*, 15 Ida. 698, 99 Pac. 826.)

Had the legislature intended to restrict the right of appeal from an order establishing a municipal corporation to those residing within the boundaries of the proposed corporation, it would, as it did relative to the good road district, sec. 1051, Rev. Codes, say so in direct terms, and not having done so, we must conclude that the general statute on appeals applies.

Nowhere in the bill of exceptions is any specification of particulars wherein the evidence is insufficient to support the findings and judgment, and this court has repeatedly held that without such specifications it will not review the testimony in

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order to ascertain if it is sufficient to support the findings. (*Humphrey v. Whitney*, 17 Ida. 14, 103 Pac. 389.)

SULLIVAN, C. J.—This proceeding involves the action of the board of county commissioners of Nez Perce county in the incorporation of the village of Ilo. The proceedings for the incorporation of said village were commenced under the provisions of sec. 2222, Rev. Codes, which provides, among other things, as follows:

“That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume and the metes and bounds of the proposed village; and if such county board, or a majority of the members thereof, shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their records, and designating the metes and bounds thereof.”

The proceedings were instituted by filing a proper petition with the said board of county commissioners, containing the signatures of a majority of the taxable inhabitants of said village, and praying for an order incorporating said village as a municipal corporation. The prayer of the petition was granted and an order entered incorporating said village. From that order the respondents, who were not residents of the territory included within the limits of said village, but were residents of a rival town near by in the same county, appealed from said order to the judge of the district court of the second judicial district for Nez Perce county. At the hearing on the appeal, a demurrer to the notice of appeal and a motion to dismiss were filed and overruled by the court. Thereafter an answer was filed by the petitioners for the incorporation of said village, and the main issue presented to



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the trial court was whether on the 15th day of April, 1909, there were 200 or more actual residents in the territory described in the petition for incorporation. After hearing the evidence the court reversed the order of the board incorporating said village, on the ground that there were not 200 actual residents within the territory described in said petition, and this appeal is from the order reversing the action of said board.

Appellants assign a number of errors which may be considered under four heads. The first is that no appeal lies from the order of the board of county commissioners establishing a municipal corporation. There is nothing in that contention, for under the provisions of sec. 1950, Rev. Codes, "An appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interests." That section gives the right of appeal to any person who deems any order or proceeding of the board illegal or prejudicial to the public interest. The respondents are taxpayers of Nez Perce county, and they declare that they deem the act incorporating said village illegal and prejudicial to the public interests. As a general rule, no person except one aggrieved or having some interest in litigation has any right to appeal. That section of the statute, however, authorizes an appeal to be taken by a taxpayer in the county from any order which he may deem prejudicial to the public interest. The wisdom of permitting a person to appeal from an order incorporating a village by one who is not a resident within the territory of such village is a matter to be determined by the legislature, and they have determined it by the provisions of said section 1950, and this court cannot question the wisdom of the legislature in that matter, but must declare the law as it is written. (*Reynolds v. Board of County Commrs.*, 6 Ida. 787, 59 Pac. 730; *School Dist. v. Rice*, 11 Ida. 99, 81 Pac. 155. See, also, *Gardner v. Blaine Co.*, 15 Ida. 698, 99 Pac. 826.)

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The next error assigned is to the effect that the appeal was taken to the judge of the district court instead of the district court, and no right existed to hear evidence on the facts or to reverse the order of the board. Sec. 1951, referring to appeals that may be taken under said sec. 1950, provides that such appeals may be taken to the district court or a judge thereof, and under that provision, if the appeal is taken to the judge instead of the court, either the judge or the court may try the matter *de novo* in case a determination thereof requires a trial. Such assignment is without merit.

The next error assigned is that the court erred in finding from the evidence submitted that there were not 200 actual residents within the corporate limits of said village at the time of filing the petition and making said order by the board. The determination of that question involves a review of the evidence, and it is contended by counsel for respondent that the specification of error in regard to the insufficiency of the evidence is not sufficient to authorize this court to review the evidence. We cannot agree with that contention. Nearly all of the evidence introduced at the hearing was in regard to the number of inhabitants residing within the limits of said village, and the court based its decision upon the ground that said territory did not contain 200 actual residents at the time said order was made, and held for that reason said board was without jurisdiction to make said order. The assignment of error is sufficient to authorize the court to review the evidence upon that question. One witness on behalf of respondents testified that "he thought" he was acquainted with all of the people in Ilo; that he did not know definitely that he was, and that a number of the persons claimed by appellants to have been actual residents of Ilo on the 15th of April, 1909, were not such residents. In response to the question, "What do you consider residence?" he testified as follows: "Well, I consider when a person moves to a place with the intention of making that place their home, and lived there long enough to be a qualified voter, a qualified elector of that precinct, that they have established their residence." The answer to that question clearly indicates upon what theory the witness testi-

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fied that certain persons were not residents of said town, and that he clearly misinterpreted the term "actual residents" as used in said sec. 2222. Another witness testified that he worked in a store in Vollmer, and that his occupation caused him to go around the town of Ilo, and that he delivered merchandise around that town, and stated: "From my knowledge of the town, there were not 200 actual residents in these boundaries on April 15th." Taking his evidence as a whole, it clearly shows that this witness was guessing at the number of inhabitants there; whereas three witnesses on behalf of the village testified that the territory included in said town of Ilo had exceeding 200 "actual residents" on the 15th of April, 1909, and also presented a census list giving the names and the number of inhabitants. We do not think a mere guess by a witness is sufficient to make a substantial conflict in the evidence where three witnesses testify positively that there were more than 200 actual residents within the confines of the territory sought to be incorporated. (*Idaho Mercantile Co. v. Kalanquin*, 8 Ida. 101, 66 Pac. 933; *Wilson v. Vogeler*, 10 Ida. 599, 79 Pac. 508; *Branson v. Caruthers*, 49 Cal. 374; *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504.)

The fourth assignment of error is to the effect that the court erred in finding that there were not 200 actual residents within the corporate limits of said village. Considerable testimony was taken whereby it was attempted to show that certain persons were not "actual" residents within the corporate limits of the town on April 15, 1909, but if a person were an inhabitant—an actual resident—of the town of Ilo on April 15, 1909, his temporary absence would not change his residence. It is a well-recognized rule of law that the domicile of a married woman follows that of her husband as well as the domicile of the minor child, and a temporary absence would not be sufficient to cause them to lose their actual residence in a town.

The provisions of said sec. 2222 authorizing the incorporation of villages should be liberally construed, and we are satisfied from the whole record that the decision of the court setting aside the order of the board incorporating said village

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Points Decided.

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must be set aside, and it is so ordered, and the cause remanded to the trial court, with instructions to affirm the order of said board incorporating said village of Ilo.

Costs of this appeal are awarded to the appellants.

Ailshie, J., concurs.

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(November 19, 1910.)

C. D. BELL, Respondent, v. FRED M. SHIELDS, Administrator of the Estate of M. J. SHIELDS, Deceased, Appellant.

[111 Pac. 1076.]

OPTION TO PURCHASE LAND—STANDING TIMBER—SALE OF—LIABILITY OF SELLER—BREACH OF CONTRACT—IMPOSSIBILITY OF PERFORMANCE—CREATED BY PARTY.

(Syllabus by the court.)

1. Where S. has an option to purchase certain lands, and sells the standing timber thereon to B. and thereafter procures the title to said land to be conveyed to N., and contracts with N. to protect S. in his contract with B., without B.'s knowledge or consent, and thereafter N. sells the land to D. & D., who are innocent purchasers, without reserving the rights of B. to take such timber from said land, *held*, that S. is liable to B. for whatever damages he sustained by being prevented from removing the timber from said land.

2. Where one party to a contract voluntarily places himself in a position whereby he is unable to carry out the provisions of his contract, he is as liable for a breach thereof as though he had deliberately refused to comply with its provisions.

APPEAL from the District Court of the Second Judicial District for Latah County. Hon. Edgar C. Steele, Judge.

Action to recover damages on contract for failure to comply with its terms. Judgment for plaintiff. *Affirmed*.

Forney & Moore, for Appellant, cite no authorities.

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C. J. Orland, for Respondent.

After Bell had expended a large amount of money in carrying out the terms of the agreement, it had then become an irrevocable license, and if violated by Shields would subject him to any damages which Bell may have suffered. (*Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 547; *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546.)

If this contract is a license, it is a license coupled with an interest, and is not revocable, and if the licensee is prevented from receiving that for which he contracted, by any act of the licensor, then the licensor is liable for any damages which the licensee has sustained. (*Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Levy v. Louisville Gunning System*, 121 Ky. 510, 89 S. W. 528, 1 L. R. A., N. S., 359.)

In order to constitute a novation, all the parties must agree to the change and terms. (21 Am. & Eng. Ency. of Law, 2d ed., 666.)

A party who puts himself in a position so that he is unable to carry out the conditions of his contract is as liable for a breach as though he deliberately refused to comply with it. (9 Cyc. 639.)

SULLIVAN, C. J.—This is an action to recover damages for the alleged breach of a contract for the sale of standing timber on land in Latah county. The case was tried by the court with a jury, and the jury returned a verdict for the plaintiff for the sum of \$660, and judgment was entered for that amount. A motion for a new trial was denied, and the appeal is from the judgment and order denying a new trial.

It appears from the record that on the 28th day of February, 1906, the respondent and M. J. Shields, who died since the trial of this action and is represented by the appellant, his administrator, entered into a contract whereby Shields sold to the plaintiff 500,000 feet of tamarack, fir and pine timber at the agreed price of one dollar per thousand feet stumpage, whereby the respondent was given two years

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from the date of said contract in which to remove said timber. It was further agreed that the respondent might at his option cut and remove all the tamarack, fir and pine timber standing and growing upon said land which was merchantable saw timber at the same price per thousand feet. By the terms of said contract, the respondent was given the right to go upon said land and make all necessary roads and improvements required in order to get out said timber, and was permitted to place a sawmill on said land at such place as he might select, and was authorized by said contract to use said land, or any part thereof, for all purposes necessary in the cutting, hauling and manufacturing said timber into marketable lumber. In pursuance of that contract, the respondent proceeded to cut and manufacture into lumber about 100,000 feet of said timber. It appears that said Shields, at the time he entered into said contract with the respondent, had an option to purchase said land and did not hold the title to the same. During the continuance of the contract with respondent, Shields sold said land to one Nolan and procured a deed to be made directly to said Nolan, with no provision in the deed protecting said respondent's rights. This was done without respondent's knowledge or consent. Shields, however, had a contract with Nolan that he would protect respondent in his said contract. Nolan thereafter sold said land to Driskel and Dixon without reserving the rights of respondent to cut said timber and without their having any knowledge of the Bell and Shields contract. Driskel and Dixon, soon after purchasing said land, began an action against the respondent to stop him from cutting more of said timber, and obtained a perpetual injunction preventing him from removing any timber whatever from said land.

The evidence introduced on the trial is substantially in accordance with the facts above stated, and under that state of facts it is contended that the defendant, as administrator of the estate of said M. J. Shields, is not liable to respondent for any damages he sustained. It is contended under the facts of this case that Nolan, by selling the premises in controversy, converted the interests of the plaintiff in the common prop-

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erty or revoked the license of the plaintiff to go upon the premises and cut the timber, and that he is the one who has caused the damage to the respondent, and is liable therefor.

It appears that the contract or sale of the land by Shields to Nolan was made in December, 1906, and that the respondent had no knowledge of it until about March, 1907. While the evidence shows that the respondent and Nolan had several conversations in regard to the timber on said land, he made no contract with him in regard to the same. The respondent thereafter saw Shields, and stated to him that he did not like Nolan's actions in regard to the matter, and it looked to him as if Nolan would try to beat him out of the timber, and informed Shields that he had a contract with him for it and would expect him (Shields) to carry out the contract. Shields replied that that was all right: "You look to me for it." Mr. Shields testified on the trial as follows: "And I told him [Bell] that Mr. Nolan had nothing at all to do with that timber—that any part of this timber that his contract would take was never transferred to Nolan, and that I would deal with him on that and see that he got everything as per his contract." The record clearly shows that the respondent did not look to Nolan to carry out said contract in the place of Shields, but it does show that he looked to Shields all the time. In the contract between Shields and Nolan whereby Nolan agreed to protect Bell, there was no substitution of the agreement between Shields and Nolan for the contract between Shields and Bell. Bell did not agree to look to Nolan for protection under his contract with Shields, did not agree to accept Nolan in place of Shields to carry out the Shields-Bell contract. There was no novation. After the controversy arose, Shields informed the respondent that he would deal with Nolan in regard to the matter and see that respondent got everything that he was entitled to under said contract. After Shields had sold to Nolan, Bell paid Shields the money claimed to be due him under the contract for timber. Shields did not look to Nolan for pay for the timber but to Bell. While Nolan agreed with Shields to protect the rights of Bell to remove said timber, Bell was no party to that contract, and

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did not agree to accept Nolan in the place of Shields. It was within Shields' power, when he procured the conveyance to be made to Nolan of the land on which said timber was situated, to have Bell's rights reserved in such conveyance, and had he done so, and Nolan or his grantees had then interfered with Bell in his removal of such timber, Bell would have had his remedy against them and not against Shields. Shields knew that the contract with Bell was not acknowledged, and could not be recorded unless proceedings were had under the provisions of secs. 3139 to 3142, Rev. Codes. By selling the land to Nolan in the manner he did, without reserving the rights of Bell in the deed, he placed it in the hands of Nolan to dispose of the land to an innocent purchaser without notice, which Nolan proceeded to do at the first opportunity and without informing the purchaser of any contract or claim of Bell to the timber. Such purchasers, immediately upon learning that Bell was cutting timber, commenced an action to enjoin him, and recovered judgment and a perpetual injunction against him. Shields thus put himself in a position voluntarily so that he was unable to carry out the provisions of said contract with Bell. Under that state of facts he is as liable for a breach of the contract as though he had deliberately refused to comply with it. (9 Cyc. 639.) Under the facts as they appear in the record, the administrator, under the contract between Shields and Nolan, would have his remedy against Nolan in case he failed to protect Bell as per his agreement with Shields.

We have examined the several errors assigned and find no reversible error in the record. The judgment must therefore be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Ailshie, J., concurs.



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Argument for Appellant.

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(November 21, 1910.)

**WILLIAM DOYLE, Appellant, v. CITY OF SANDPOINT,**  
Respondent.

[112 Pac. 204.]

**INJUNCTION—WRONGFUL ISSUANCE OF INJUNCTION—DAMAGES CAUSED  
BY INJUNCTION—MUNICIPAL LIABILITY FOR ISSUANCE OF INJUNCTION.**

(Syllabus by the court.)

1. Under the statute of this state, sec. 4291, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation.

2. Where no bond or undertaking is required on the issuance of an injunction, there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously and without probable cause.

3. A municipal corporation cannot be held for the maliciously suing out of a writ of injunction without probable cause, for the reason that such an act would be *ultra vires* and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting.

**APPEAL** from the District Court of the Eighth Judicial District, for Bonner County. Hon. Robert N. Dunn, Judge.

Action by the plaintiff to recover damages sustained by reason of the wrongful issuance of an injunction. Judgment for defendant and plaintiff appealed. *Affirmed.*

W. C. Jones, and E. W. Wheelan, for Appellant.

After a very diligent search of the authorities we are unable to find any case in which a party which was exempted by law from giving a bond has sought to escape its liability for damages resulting from the wrongful issuance of an injunction, on the ground that the action was not brought on a bond that never existed and under the law could not exist. The only authority which we have been able to find which even discusses the question is *Gorton v. Brown*, 81 Am. Dec. 245.

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Argument for Respondent.

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A municipal corporation which transacts its business through a legislative body, to wit, the municipal council, cannot be charged with malice, and if the position of defendants can be sustained, it results that no matter what damage such a corporation may do by a wrongful injunction, the injured party is absolutely without remedy. *Hubble v. Cole*, 88 Va. 236, 29 Am. St. 716, 13 S. E. 441, 13 L. R. A. 311, holds squarely that a suit on the bond is only an accumulative remedy, and cites many authorities to sustain its position.

Herman H. Taylor, and B. S. Bennett, for Respondent.

In the early history of equity jurisprudence, preliminary injunctions were often issued without requiring a bond, and upon the dissolution of the injunction which had been wrongfully sued out, the defendant had no remedy other than an action for malicious prosecution. (10 Ency. Pl. & Pr. 1012; 16 Ency. of Law, 429-440; 22 Cyc. 1061.) A practice then grew up in courts of equity requiring the complainant to give a bond to indemnify the defendant against whom the injunction was sought, and thus a new liability arose, but such liability was dependent entirely upon the obligation exacted from the plaintiff, and without some security given before the injunction was granted, the defendant even then had no remedy for any damages he might sustain from the issuing of the injunction, unless the conduct of the plaintiff was such as to give ground for an action for malicious prosecution. (16 Am. & Eng. Ency. of Law, 440, citing a large number of cases in the notes; *Palmer v. Foley*, 71 N. Y. 106; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Lexington etc. R. Co. v. Applegate*, 8 Dana (Ky.), 289, 33 Am. Dec. 497.)

The statute clearly exempts the state or a municipal corporation from undertaking to pay damages, costs and counsel fees where a temporary injunction is granted to them. (3 Elliott on Ev., 1969.)

The sole remedy of the defendant is upon the bond given as a condition precedent to the securing of the writ of injunction; such remedy is not cumulative, but is the only

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security the defendant has, unless the writ is sued out maliciously. (*Hayden v. Keith*, 32 Minn. 277, 20 N. W. 195.)

There is an action in the nature of an action on the case for trespass upon a showing of malice and want of probable cause, entirely independent of any action that the party aggrieved might have upon the bond or undertaking in case one were given. (*Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; 16 Ency. of Law, 440; 10 Ency. Pl. & Pr. 1118; *Hess v. German Baking Co.*, 37 Or. 297, 60 Pac. 1011.)

AILSHIE, J.—This action was commenced by appellant against the city of Sandpoint to recover damages for the issuance and wrongful continuance of an injunction, preventing the use of a certain building owned by him situated in the corporate limits of the defendant city. The original action in which the injunction issued was instituted by the city against Doyle to enjoin and restrain him from connecting his building with a bridge constructed and maintained by the city along and over the street in front of the building. That case was finally determined by this court adversely to the city. (*Village of Sandpoint v. Doyle*, 14 Ida. 749, 95 Pac. 945, 17 L. R. A., N. S., 497.) Under the provisions of the statute, sec. 4291, Rev. Codes, "On granting an injunction, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto."

It will be observed from the provisions of the foregoing section that the city comes within the excepted class, and was not required to give an undertaking on the issuance of an injunction, and so no undertaking was required or given by the city on the suing out of the injunction in the case of *Sandpoint v. Doyle*.

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The question with which we are confronted in this case is whether a municipal corporation is liable for damages for wrongfully suing out a writ of injunction or wrongfully causing the same to be continued in force. It is clear to us that as to any party specifically excepted from the operation of the statute, there can be no liability for damages unless it be alleged and proven that the injunction was procured maliciously and without probable cause. (22 Cyc. 1061.) It is well established by the authorities that damages caused by an injunction, erroneously granted in the exercise of jurisdiction where the proceedings have been regular, cannot be recovered from the party who obtained the writ in the absence of a bond or undertaking, unless it be shown that the transaction was malicious and without probable cause. (*Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Hess v. German Baking Co.*, 37 Or. 297, 60 Pac. 1011; *Columbus, Hocking Valley etc. Co. v. Burke*, 54 Ohio St. 98, 43 N. E. 282, 32 L. R. A. 329; *Cox v. Taylor*, 10 B. Mon. (Ky.) 17.)

In the note to *Mark v. Hyatt*, 18 L. R. A. 275, the editor says: "The law is well settled that no right of action exists for damages sustained in consequence of an injunction except when founded upon an injunction bond or undertaking, unless the injunction was obtained maliciously and without probable cause." A large number of authorities are cited in support of that statement. In *Robinson v. Kellum*, 6 Cal. 399, the court says: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice, and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice." This case is cited and quoted from with approval in *Asevado v. Orr*, *supra*.

It will be observed that where the statute requires an undertaking on the issuance of an injunction it obligates the plaintiff and sureties "to the effect that the plaintiff will

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pay to the party enjoined such costs, damages and reasonable counsel fees, not exceeding the amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto." The statute therefore provides in those cases for the recovery of damages by the defendant, irrespective of the question of "malice" or "probable cause," in the event "the court finally decide that the plaintiff was not entitled" to the injunction. On the other hand, as may be seen from an examination of the authorities, it is firmly established that in the absence of an undertaking, the only liability against the party suing out the injunction is for damages caused where the injunction was procured through malice and without probable cause. In the present case, the action is not prosecuted on the grounds of malice, but the suing out of the writ of injunction and continuing it in force from the time of its issuance is alleged as the cause of the damage, and the damages demanded are the usual damages allowed and recoverable under the statutory undertaking. It is clear that such an action cannot be maintained.

It is argued by counsel for appellant that the state, a county, municipal corporation, or married woman is, under the provisions of that section, just as liable for damages resulting from the wrongful or erroneous issuance of an injunction as is anyone who gives an undertaking under the provisions of the statute, and that the only purpose of the exception was to avoid the inconvenience and annoyance that might be entailed on the state, county or city officer or a married woman, in case they were required to secure an undertaking before the writ would issue. It is further contended by counsel that an undertaking on the part of the excepted classes would not add anything to the security. We cannot agree to this line of reasoning. In the entire absence of this statute, there would be no liability for the wrongful or erroneous suing out a writ of injunction, except in cases where a court of equity might see fit to require a bond in advance. In the absence of the statute it is, therefore, clear that the state, county and municipal corporation would not

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be liable as on bond. It is equally certain that this statute does not require them to give a bond or declare that they shall be liable, the same as an individual, although they do not give a bond. The reasons for the enactment of this statute might be the subject of much speculation, but we are inclined to think that it was the legislative purpose to exempt the public from such liability, whether they be acting as a state, a county, or a municipal corporation, and that it was considered by the law-making power that since an injunction procured by a municipal corporation must be sought and procured through executive or administrative officers who can have no personal interest in the matter except the discharge of their public duties; and the writ, if granted at all, must be granted by the judicial department of the state—that with these two means of investigation and two branches of the state government passing upon the matter the chances of damages occurring to the individual would be minimized, and that no liability should be imposed on the public for any error or misjudgment on the part of the officers, both executive and judicial, so acting. Primarily and theoretically, it is supposed, as a principle of law, that the public, whether it be the state, a county, or municipal corporation, acting through its duly constituted officers, will not commit any wrong against the citizen. This will be true in practice as well as theory so long as the officers who represent the public do not fall into any errors, either of omission or commission. Experience has shown, however, that the latter is largely a theory and not always a fact.

Now, if the plaintiff had commenced this action charging the city of Sandpoint with having procured the injunction maliciously and without probable cause, he would, it seems to us, fail, for the reason that the municipality could not be guilty of procuring a writ of injunction maliciously. If the officers of the city acted maliciously and without probable cause in suing out the writ, the act would be that of the individuals and not of the municipality. To act maliciously would be outside of the scope of official duty and authority and would become the personal act of the individual for which he and not the city would be responsible. (*Horton v. Newell*,

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Argument for Appellant.

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17 R. I. 571, 23 Atl. 910; *Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627; 1 Smith Modern Law of Munic. Corp., sec. 811.)

The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, C. J., concurs.

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(November 23, 1910.)

JOHN KEATING, Appellant, v. THE KEATING MINING CO. et al., Respondents.

[112 Pac. 206.]

**MINING CLAIMS—SALE OF—FRAUD AND CONSPIRACY—MORTGAGE—FORECLOSURE OF—FINDING OF FACTS—SUFFICIENCY OF EVIDENCE—FOREIGN CORPORATION—FILING ARTICLES—DESIGNATION OF AGENT—TAKING TITLE TO REAL ESTATE—PURCHASE PRICE—RESCISSION—LACHES.**

(Syllabus by the court.)

1. The evidence held sufficient to sustain the finding of facts.
2. Where a seller receives the entire purchase price of the property sold and acquiesces in the transaction after he has had full knowledge of all the facts concerning it, he is estopped from a rescission of the contract by reason of his laches and neglect.
3. Where an owner has sold and conveyed real estate, and has received the purchase price therefor, he can neither legally nor equitably question the capacity of the vendee to take and hold the title.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Action to recover title to certain mining claims. Judgment for defendants. *Affirmed*.

A. G. Kerns, for Appellant.

“Laches cannot be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to cor-

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Argument for Respondents.

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rect a mistake in the description of premises in a conveyance through which title must be deduced. The possession is notice to all of the possessor's equitable rights, and he needs to assert them only when he may have occasion to do so." (*Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. ed. 728; *Brainard v. Buck*, 184 U. S. 99, 22 Sup. Ct. 458, 46 L. ed. 449; *Underwood v. Dugan*, 139 U. S. 380, 11 Sup. Ct. 618, 35 L. ed. 197.)

The record shows that during all of the period after March, 1906, the plaintiff was seeking to secure his money for the property, and that the delay in commencing the suit was caused by the defendants. "A plaintiff cannot be chargeable with laches caused by the defendants." (*Gunton v. Carroll*, 101 U. S. 426, 25 L. ed. 985.)

"A statute of limitation declaring the time within which action shall be commenced for relief on the ground of fraud applies to actions for relief from judgments obtained by fraud and conspiracy; and if commenced within the time therein limited, an action cannot be treated as barred by laches." (*Lang Syne G. M. Co. v. Ross*, 20 Nev. 127, 19 Am. St. 337, 18 Pac. 358; 2 Pom. Eq. Jur. 608.)

The Keating Mining Co. never acquired any title to the property involved herein, because it had not complied with the law relative to foreign corporations. (*Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873; *Tarr v. Western L. & S. Co.*, 15 Ida. 741, 99 Pac. 1049.)

John P. Gray, and Featherstone & Fox, for Respondents.

Keating is seeking in this action a rescission of the contract of March 21, 1906. He is barred by his laches and by his ratification.

Any deliberate act on his part, done with the full knowledge of his rights, inconsistent with an intention to rescind, and in effect taking advantage of the sale for his own benefit, will constitute an election to affirm the sale, by which he will be bound. (*Emma etc. Co., Ltd., v. Emma etc. Co.*, 7 Fed. 401; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. ed. 804; 29 Am. & Eng. Enc. Law, 2d ed., 675.)



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The right to rescind has been denied where after knowledge that the contract was voidable he extended the time of performance (*Kraner v. Chambers*, 92 Iowa, 681, 61 N. W. 373; *Hawes v. Swanzey*, 123 Iowa, 51, 98 N. W. 586; *Herman v. Greseke* (Tex. Civ.), 33 S. W. 1006); and where he makes use of the consideration (*Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Dunks v. Fuller*, 32 Mich. 242; *Campbell v. Foster*, 2 Tenn. Ch. 402; *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867); and where he voluntarily delivers possession (*Hatch v. Ferguson*, 57 Fed. 959); also, where others have acquired an interest in the property (*Litchfield v. Browne*, 70 Fed. 141, 17 C. C. A. 28; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Emma Silver Mine Co. v. Emma Silver Mine Co. of N. Y.*, 7 Fed. 401). The right to rescind has been denied in Idaho on the ground of estoppel. (*Eastwood v. Standard Mines Co.*, 11 Ida. 195, 81 Pac. 382.)

The court in this case, upon all the evidence, found that Keating was guilty of laches, which, even if his claims were true, would bar him from relief. (16 Cyc. 152, 162; *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. ed. 214; *Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. ed. 480; *Idaho Gold Mines Co. v. Union Mines Co.*, 5 Ida. 107, 47 Pac. 95; *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. 239, 24 Pac. 837; *Kerr, Mistake and Fraud*, Bump's ed., pp. 302-306; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329.)

SULLIVAN, C. J.—This action was brought to restrain the sheriff of Shoshone county and his successors in office from executing or delivering to the defendant Goodsell, or his assigns, a sheriff's deed conveying the Golden Curry, the Savage, the Savage No. 2, the Grouse and the Minnie Moore lode mining claims situated in the Yreka mining district, Shoshone county; and to vacate and set aside a deed dated November 20, 1905, made by John Keating to J. Frank Watson, conveying to said Watson the aforesaid mining claims; also to set aside a deed dated August 15, 1906, executed by the said Watson and wife to the Keating Mining Co., conveying said described mining claims to said company; and to set aside and

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hold for naught a certain mortgage upon said mining claims executed by the said Keating Mining Co. to the defendant David Goodsell; and to set aside a certain judgment rendered February 17, 1908, in the district court of Shoshone county in an action wherein the said Goodsell was plaintiff and the said Keating Mining Co., defendant, which judgment directed the foreclosure of the aforesaid mortgage; and to quiet the title to said mining claims in the plaintiff, John Keating, or in case said relief could not be granted, then that the plaintiff be awarded a vendor's lien against said mining claims to secure to him the payment of the sum of \$22,500, together with interest, and that such vendor's lien be given priority over all other liens against said mining claims, and for other relief.

The pleadings put in issue certain transactions between defendants J. Frank Watson, P. J. and R. J. Jennings, and it is alleged in the complaint that a conspiracy was entered into by said three defendants with the intent to cheat and defraud the plaintiff out of said mining claims without paying the agreed purchase price therefor; and it is also alleged that the defendant Goodsell procured a mortgage for \$16,000 on said property for the purpose of cheating and defrauding the plaintiff out of said mining claims and the purchase price therefor. By amendment to the complaint, it is alleged that said Keating Mining Co. is a foreign corporation, and at the time J. Frank Watson and wife conveyed said mining claims to said corporation it had not complied with the constitution and laws of this state in regard to filing its articles of incorporation and designating an agent upon whom service of process might be made, and that for that reason it took no title to said property through said conveyance.

Upon the issues made by the pleadings, the cause was tried by the court and finding of facts was made and judgment entered in favor of the respondents. The appeal is from the judgment.

**STATEMENT.**

It appears from the record that sometime in 1905, appellant gave an option to purchase certain mining claims owned by him near Wardner, Idaho, to a man named Devin. About

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November 1st of that year, Devin interested respondent P. J. Jennings in the property and introduced him to the appellant Keating. After some negotiations with Keating and Devin, Jennings went to Portland, Oregon, and presented the matter to respondent J. Frank Watson, a banker. It appears that Jennings represented to Watson that Keating wanted \$25,000 for said mining claims, to be paid as follows: \$2,500 in cash, \$2,500 in June, 1906, and \$20,000 in a year, and that if Watson would put up \$2,500 in cash and take care of the payroll in the development of said mining claims for ninety days, that he (Jennings) thought they could turn the property and make some money. After considering the matter, Watson agreed to put up the \$2,500 in cash and take care of the payroll for ninety days. Jennings then went to Wardner and met Keating and Devin, and after certain negotiations with them they returned to Portland with him, at which place they called on Watson, and the following agreement was entered into by Keating and Watson:

“Memorandum of agreement made between John Keating of Wardner, Shoshone County, Idaho, hereinafter called the first party, and J. Frank Watson, Trustee, of Portland, Oregon, hereinafter called the second party,

“WITNESSETH; The first party agrees to sell to the second party the following lode mining claims situated in Yreka Mining District in Shoshone County, Idaho, as follows, to wit:

“The Golden Curry and the Savage, as described by United States patent; also the Eastern Extension of said Savage, known as ‘Savage No. 2’; the Eastern extension of Golden Curry, known as ‘The Grouse’; and the Western Extension of the Savage, known as ‘Minnie Moore,’ for the sum of Twenty-five Thousand Dollars (\$25,000.00) payments to be made as follows:

“On or before December 8, 1905.....\$ 2,500.00

“On or before June 8, 1906..... 2,500.00

“On or before December 8, 1906..... 20,000.00

“Said first party agrees to furnish an abstract of title showing a good, clear and unencumbered title to each of said claims; the title to be satisfactory to, and subject to the ap-

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proval of said second party; and also, upon the payment of the first twenty-five hundred dollars, to deposit, in escrow, at the Merchants National Bank of Portland, Oregon, a deed to said five claims, free and clear of all liens and incumbrance and showing a clear title thereto, executed to said second party.

“It is further agreed between the parties hereto that if any of the payments above mentioned are not made at the time when due, then the payments which shall have been made shall be forfeited, and that this agreement shall thereupon become void and of no effect.

“The second party agrees to work at least sixty (60) shifts per month, beginning on or before December 9, 1905, and to deposit the actual net proceeds of ore mined, after paying all the expenses incident to the production thereof, to the credit of the first party to apply on the purchase price of said mining claims; and to render said first party monthly statements of any and all ore shipped; said second party to have the right to work the property in mine fashion as to him seems best.

“The first party is to have access to the property at any time during the life of this agreement for the purpose of inspection of the work.

“IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals in duplicate, this 9th day of November, 1905.

“(Seal) JOHN KEATING.

“(Seal) J. FRANK WATSON.”

Thereupon Watson made the first payment of \$2,500 to Keating and a deed for the mining claims in favor of Watson was deposited in the Merchants' National Bank of Portland in escrow. Watson acted as trustee. Work was commenced on the mining claims and Watson advanced the money to carry on such work until about the month of March, 1906. Prior to that date Watson had advised Jennings that he had already put up more money than he had anticipated would be necessary, and that he would not continue to put up money, as he could not see the outcome, as no ore had yet been discovered.

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Jennings thereupon went to Wardner, inspected the property and advised the appellant that Watson was not willing to advance any more money on said agreement. Jennings thereupon agreed with the appellant that if he would convey said mining claims, he would have organized a mining company for the purpose of owning and developing the same, and would pay Keating 60,000 shares of the capital stock of the Standard Development Co., and in addition thereto, 100,000 shares of the capital stock of the mining company to be organized to take over said Keating mining claims; or, in lieu of the 100,000 shares, \$7,500 in cash. It seems that Keating agreed to this, and returned with Jennings to Portland, Oregon, and an interview was had with said Watson, and thereupon the following agreement was entered into by P. J. Jennings and John Keating, to wit:

“THIS AGREEMENT made and entered into this twenty-first day of March, 1906, by and between John Keating of Wallace, Idaho, and P. J. Jennings of Portland, Multnomah county, Oregon,

“WITNESSETH, That whereas under the conditions of a certain escrow agreement now on deposit with the Merchants National Bank, Portland, Oregon, between said John Keating and J. Frank Watson, it is provided that the following amounts shall be paid by said J. Frank Watson to said John Keating, viz.:

“Two thousand, five hundred dollars (\$2,500.00) on or before June 8th, 1906, and twenty thousand dollars (\$20,000) on or before December 8th, 1906, and

“Whereas, said first party has sold to said second party hereto all his right, title and interest in and to said amounts to become due on said escrow agreement for fifteen thousand dollars (\$15,000), of stock in the Standard Development Company and hereby agrees that on or before December 1st, 1906, he will pay to said first party the balance or seven thousand five hundred (\$7,500) dollars in cash or one hundred thousand shares (100,000) of the capital stock of a Corporation to be formed covering the said mining claims, which capital stock

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shall be one million (1,000,000) shares of \$1.00 par value each.

"IN WITNESS WHEREOF, the parties hereto have signed these presents this day and year first above written.

"JOHN KEATING,

"P. J. JENNINGS."

It is alleged in the complaint that at the time said last-mentioned agreement was made, R. J. and P. J. Jennings and Watson, respondents, made a verbal agreement with Keating to pay him \$2,500 in addition to the consideration mentioned in said agreement. On March 21, 1906, the date when said last-mentioned agreement was executed, the appellant Keating directed by letter the Merchants' National Bank of Portland to deliver the deed theretofore placed in escrow to Watson without further payment. Thereupon P. J. Jennings delivered to the appellant certificates for 60,000 shares of the capital stock of the Standard Development Co. This stock was borrowed by P. J. Jennings from his brother, R. J. Jennings. P. J. Jennings induced Watson to keep the payroll at the mine going with the expectation of interesting eastern people in the property. This Watson did until he had advanced in the neighborhood of fifteen or sixteen thousand dollars. Watson thereupon, with two mining engineers, visited and inspected said mining claims, and after said inspection declined to advance any further sums for their development and so notified Jennings.

In the month of May, 1906, Watson, together with others, caused to be incorporated under the laws of the state of Oregon the Watson Mining Co., with a capital stock of one million dollars, divided into 1,000,000 shares of the par value of one dollar each; with the intention of turning over the Keating mining claims to such corporation. But the property was not turned over to the corporation, and nothing but the mere organization of the company was effected at that time. Upon Watson's notifying P. J. Jennings that he would not advance any further sums of money in the promotion of said enterprise, said Jennings interested his brother, R. J. Jennings, in the property, and the latter thereupon, on August

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1, 1906, entered into an agreement with Watson, by which he purchased all of Watson's interest in the property and in the corporation to be formed for the purpose of owning, holding and developing said mining claims. R. J. Jennings thereupon caused the name of the mining company organized as the Watson Mining Co. to be changed to the Keating Mining Co., and by direction of R. J. and P. J. Jennings, Watson, on or about August 15, 1906, conveyed by deed to the Keating Mining Co. the mining claims which had been conveyed to him by Keating, and the deed was filed for record in Shoshone county on September 27, 1906. The defendant Goodsell was requested by R. J. Jennings to become a director in said corporation, and one share of the stock of said corporation was put in his name for the purpose of qualifying him to act as a director. It appears that Goodsell had no interest in the corporation or property other than the one share of stock. Thereafter the work of developing the property was continued and the funds for the payment of such development were secured in part by sales of the treasury stock of the Keating Mining Co. and by advances and loans of money made to the corporation by R. J. Jennings. The development work on said claims continued until sometime in the summer of 1907, when the company became unable to pay its bills, and various liens for labor and supplies were filed against the property and suits were commenced to foreclose them. The mining company employed counsel to delay the foreclosure of the liens in order to give the company an opportunity to raise the money with which to pay off such indebtedness. In June, 1907, P. J. Jennings called upon the defendant Goodsell and informed him that liens had been filed against the company and that there were other debts that would have to be met, and sought to borrow from Goodsell sufficient money to pay off the indebtedness of the respondent company, and offered to secure Goodsell by a mortgage upon the property. Jennings represented to Goodsell that he was negotiating a deal with a man by the name of Henschel, whereby he expected to obtain sufficient funds to pay off the indebtedness and liens of the company and for the further development of

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said property. Goodsell did not at that time give Jennings an answer. Henchel thereafter called on Goodsell and represented that he had an option on the treasury stock of said company, and that within a short time after his return from the east, he could arrange for the money to take up the treasury stock, and asked Goodsell if he could not tide the mining company over until his return. About September 1st, 1907, P. J. Jennings again called on Goodsell and stated that something would have to be done immediately, as the liens were to be foreclosed. He further advised Goodsell at that time that the Keating Mining Co. was indebted to R. J. Jennings in a sum exceeding \$7,500, and that R. J. Jennings was indebted to Goodsell in the sum of \$7,500 and interest, and that Jennings would assign to Goodsell his indebtedness against the company in payment of said indebtedness from R. J. Jennings, and that the company would execute a note for \$16,000 and a mortgage to secure the assigned indebtedness of R. J. Jennings, and the balance, to be represented by the note and mortgage of the company, should be advanced by Goodsell for the purpose of paying off the indebtedness of the Keating Mining Co. After some further negotiations, and on or about September 4, 1907, Goodsell agreed to take an assignment of R. J. Jennings's claim against the company and advance certain money, and take a note and mortgage from the company for the assigned claim and for money to be advanced by him, and the corporation on that day, by resolution of the board of directors, empowered the president and secretary to borrow the sum of \$16,000 and to execute a note therefor and mortgage to secure the same, which was done. Goodsell thereupon proceeded to Wallace, Idaho, and examined the records of Shoshone county for the purpose of ascertaining whether or not the property was in such condition as to justify him in satisfying the liens and paying out the money secured by the note and mortgage, and after satisfying himself, he filed his mortgage for record and thereupon paid off the liens and other indebtedness of the company in an amount in excess of \$8,500, personally attending to the matter of paying the bills and settling the liens, at the request of the



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Keating Mining Co. Thereafter the mining company made default in the payment of said note and Goodsell, on November 9, 1907, commenced an action to foreclose the mortgage, and a judgment was entered for the sum of \$17,332.48 and a foreclosure sale of the mortgaged property decreed, and on February 20, 1908, the sheriff of said county sold the property to Goodsell for the amount of the judgment and issued to Goodsell a sheriff's certificate of sale.

THE FINDING OF FACTS.

Upon these facts and all of the evidence, the trial court found that Keating accepted and received 60,000 shares of the capital stock of the Standard Development Co. at the agreed price of twenty-five cents per share, or \$15,000; that thereafter he accepted and received 100,000 shares of the capital stock of the Keating Mining Co.; that said 100,000 shares of stock were accepted by him after consulting with his attorney and deliberation on the matter, and with the full knowledge of the liens against said mining claims, and that Keating has at all times held and retained said certificates of stock since said date until during the trial of this cause. The court also found that there was no conspiracy or fraud in regard to said transaction, and that because of Keating's accepting and retaining the entire purchase price for said mining claims and his long acquiescence in said matter subsequent to the execution and recording of the mortgage to Goodsell, he is not entitled to the relief prayed for in his complaint because of his laches and neglect. Upon all of the evidence the court found that no other agreement or contract was made or entered into between the parties on the 21st day of March, 1906, except the written contract above set forth made on that day, and that "no consideration was agreed to be paid except that mentioned in said agreement in writing." The court there finds against the allegations of the complaint to the effect that the defendants had agreed orally at the time said written contract was made that they would pay Keating \$2,500 in June, 1906. The court also found that the terms and conditions of said contract had been complied with, and

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as to the allegations of conspiracy to defraud, the court found as follows:

“The court further finds that the allegations of the plaintiff’s complaint, charging fraud and conspiracy against the defendants, is not sustained by the evidence, and finds that the defendants are not guilty of fraud or of any conspiracy to defraud the plaintiff. The court further finds that the defendant David Goodsell was guilty of no fraud in the premises, and that the said defendant David Goodsell was not a party to any conspiracy to defraud the plaintiff out of his property or to defraud the plaintiff at all.”

The court found that the defendant Goodsell advanced the money and took said mortgage in good faith and for a valuable consideration, and without notice of any claim or equity of the plaintiff or any other person to the property of said Keating Mining Co., and that the same was in all respects a *bona fide* transaction. The court clearly finds that the entire transaction in regard to the negotiations for the purchase of said mining claims, the contract entered into, the deeds conveying said mining claims, the execution of said mortgage to Goodsell, were all done and performed in good faith, and the evidence is sufficient to support these findings. The finding of facts is sufficient to defeat the recovery by the plaintiff.

#### FOREIGN CORPORATION.

The contention of counsel for appellant to the effect that the Keating Mining Co., being a foreign corporation, could not take title to said mining claims as shown by the facts established on the trial, for the reason that it had not, at the time Watson conveyed said mining claims to said corporation, complied with the constitution (sec. 10, art. 11) and laws of the state (sec. 2792, Rev. Codes) in regard to filing its articles of incorporation and designating an agent upon whom service of process might be made, is not well taken, for the following reasons: First, it is found that the contract for the sale of said mining claims was a legal, valid contract, procured without conspiracy or fraud on the part of the defendants, and that Keating had accepted and received the entire purchase

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price therefor; and, second, that Keating had received the entire purchase price and acquiesced in the transaction after he had knowledge of all of the facts concerning said transaction, and is estopped from recovering by reason of his laches and neglect in not rescinding the contract and returning the purchase price within a reasonable time after he concluded that he had been defrauded. That being true, applying the rule laid down by this court in *Katz v. Herrick*, 12 Ida. 1, 86 Pac. 873, Keating having received the full purchase price for said mining claims, the right of the Keating Mining Co. to take and hold title to said mining claims is one that can neither legally nor equitably concern Keating, at least no further than as a stockholder thereof. This court in the *Katz-Herrick* case said: "The right to take and hold title to real property is one that can neither legally nor equitably concern the vendor thereof after he has parted with his title and received the purchase price therefor." If this court should hold under said contention of appellant that the Keating Mining Co. had no title to said property because of its failure to comply with the laws of this state, under the facts of the case as shown by the evidence the title would be in the defendant Watson, and that would not avail Keating in any manner. But the appellant, having received full compensation for said claims, cannot now legally or equitably be concerned therein, as he has parted with his title thereto and received the purchase price therefor.

**METHOD OF IDENTIFYING EXHIBITS.**

During the cross-examination of the appellant, counsel exhibited to him certain letters for identification, and the witness testified that he did not know whether the letters presented contained his signature or not, and stated to the counsel that he might tell whether they contained his signature if he were allowed to read them. Counsel for appellant thereupon stated to the court that the witness had a right to examine the letters which he was asked to identify, and requested that the witness be permitted to read the letters. The court denied the request, and that action of the court is as

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signed as error. When counsel presents a paper to a witness for identification, and the witness states that he cannot identify it unless he is permitted to look at the paper and read it, it is error for the court not to permit the witness to examine it. The court ought not to permit a paper to be marked for identification where it has not been properly identified by the witness, and he is permitted to examine it before he identifies it if he desires to do so. It is unfair to the witness to require him to testify whether a certain paper contains his signature without permitting him to examine it. Such an examination would no doubt refresh his memory in regard to the matter. Merely showing a witness a signature and requiring him to state whether or not he signed the paper to which that signature is attached, without permitting him to examine the paper so as to identify it understandingly, in this age when forgers have become so expert, is not consistent with reason and fairness. However, in this case, after said letters were introduced in evidence, it was apparently admitted that he signed them, as he was not placed upon the stand to testify to the contrary. Therefore the action of the court in that matter was error without prejudice, and not cause for reversal.

Other errors are assigned, and after a careful examination of them we are satisfied that there is not sufficient error appearing in the record to justify a reversal of the judgment. The judgment is therefore affirmed, with costs in favor of the respondent.

Ailshie, J., concurs.

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Points Decided.

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(November 26, 1910.)

**E. E. PYLE and ALETHA J. PYLE, Plaintiffs, v. HON. WILLIAM W. WOODS, Judge of the First Judicial District, Defendant.**

[111 Pac. 746.]

**PROHIBITION—PROCEEDINGS IN CONDEMNATION—AWARD OF DAMAGES BY COMMISSIONERS—PAYMENT BY CONDEMNOR—RIGHT OF TRIAL BY JURY—TERMINATION OF PROCEEDING.**

(Syllabus by the court.)

1. A corporation armed by the constitution and statutes of this state with the power of eminent domain has no right to enter upon and take possession of the premises sought to be condemned until it either pays to the owner of the property the amount assessed and found as damages by commissioners duly appointed, or, in case the owner refuses to accept the award, has paid the same to the clerk of the court to abide the result of the action.

2. Where the parties to a condemnation proceeding are unable to agree in the first place upon the value of the property and the damages that will be sustained, if the damages are subsequently assessed by commissioners appointed in conformity with the statute (sec. 5226), and the plaintiff voluntarily pays the award to the defendant or into court to abide the result of the action, and the defendant voluntarily receives and accepts such award, the payment thus made by the party plaintiff and received and accepted by the party defendant constitutes a contract or voluntary agreement between the parties, and terminates the proceeding and entitles the plaintiff to its decree in condemnation.

3. Where a plaintiff in condemnation has procured the appointment of commissioners to assess the damages that would be sustained by the property owner, and has thereafter voluntarily paid the award to the defendant or to the clerk of the court and taken possession of the premises sought to be condemned, such plaintiff is not thereafter, on its own motion, entitled to have the question of damages and compensation submitted to a jury, and the court has no jurisdiction to do so over the objection and protests of the defendant who is ready and willing to accept the award as full compensation for the damages he will sustain by reason of the condemnation.

4. In a proceeding under the statute in condemnation, primarily, the right of trial by jury is accorded equally to both parties to the action. As a substitute therefor, there is accorded to the plaintiff

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Argument for Applicants.

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the right of having commissioners appointed to assess the damages that will be sustained by the defendant, and if the plaintiff pays such award and the defendant accepts the same, the right of trial by jury is ended. If, on the other hand, the plaintiff pays the award and the defendant refuses to accept it, the plaintiff may no longer demand a jury, but the defendant may still demand a jury to assess the damages that he will sustain. If, however, the defendant accepts the award, he waives the right of trial by jury and the litigation thereby ends.

5. Upon an award of commissioners in condemnation proceedings, if the amount awarded is paid by the plaintiff and accepted by the defendant, a decree confirming such action of the parties will be in substance a decree by consent or confession, and will come as fully within the purview of the statute as if the case had gone to trial before a jury and judgment and decree had been entered on the verdict.

6. Sec. 5226, Rev. Codes, confers all the jurisdiction necessary to a hearing and assessment of damages, and all the means necessary to carry into effect the proceedings had is conferred by the general statute, sec. 3925.

Original application for a writ of prohibition against the Honorable William W. Woods, as judge of the District Court of the First Judicial District. Alternative writ issued and return and motion made to quash the writ. Motion denied and writ made perpetual.

C. W. Beale, Walter H. Hanson, and James A. Wayne, for Applicants.

Sec. 14 of art. 1 of our constitution specifically prohibits the taking of property until a just compensation to be ascertained in a manner prescribed by law shall be paid for the same. It has been held by this court in *Portneuf Irr. Co., Ltd., v. Budge*, 16 Ida. 116, 100 Pac. 1046, that the award of the commissioners is an ascertainment in the manner prescribed by law of the compensation that should be first paid before the property is taken. Can it be successfully contended that this railway company, having resorted to this legal manner of ascertaining the compensation, and having taken possession of the property, should enjoy the unheard of right and privilege of having it ascertained in some other manner

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as to the award it should pay for the appropriation of the property when it had already consented to this legal method, had deposited the money to go to the proper claimant, and had taken possession of the property, constructed its railroad thereon, and was still in possession thereof, and maintaining its road thereover?

Under sec. 5226, it is the plaintiff and not the defendant who can invoke the aid of commissioners for the assessment and determination of the damages that the defendant will sustain by reason of the condemnation and appropriation of his property, and it is the defendant and not the plaintiff who has the privilege of saying whether or not he will accept the award, and the plaintiff has no appeal when the defendant decides to accept the award.

A. H. Featherstone, and F. M. Dudley, for Defendant.

An examination of the eminent domain statute shows clearly that the law never contemplated the possibility of such an award being made the basis of a judgment. Sec. 5215, Rev. Codes, provides that "all proceedings under this title must be brought in the district court." The powers conferred by sec. 5219 are in express terms conferred upon the "court." By the provisions of sec. 5220 the testimony is to be heard and the damages assessed by "the court, jury or referee." Upon the verdict of the jury, or the findings of the court or referee, if a jury be waived, the court is to enter a "final judgment." (Sec. 5223, Rev. Codes; *Cal. So. Ry. Co. v. S. P. Ry. Co.*, 67 Cal. 59, 7 Pac. 123.)

AILSHIE, J.—This is an application for a writ of prohibition against the judge of the district court of the first judicial district to restrain and prohibit him trying a case pending in his court entitled Chicago, Milwaukee & St. Paul Ry. Co. of Idaho, a corporation, plaintiff, vs. E. E. Pyle and Aletha Pyle, his wife, and the Northern Pacific Ry. Co., a corporation, defendants. The various pleadings, proceedings and orders had and made in the case are set out in full in plaintiff's

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petition, and the questions of law are presented to us on motion by the defendants to quash the writ.

It appears that on the 9th day of March, 1908, the Chicago, Milwaukee & St. Paul Ry. Co. of Idaho, a corporation—which for convenience we will hereafter designate as the Milwaukee Co.—instituted an action in the district court in and for Shoshone county against the plaintiffs herein and the Northern Pacific Ry. Co., as defendants, whereby the plaintiff sought to condemn a strip of land 200 feet wide across certain lots and fractional lots situated in Shoshone county and occupied and claimed by the defendants Pyle, and to which the Northern Pacific Ry. Co. also claimed the title. Summons appears to have been issued and served in conformity with the provisions of sec. 5217, Rev. Codes, and within the time prescribed by the summons the defendants Pyle appeared and demurred. The Northern Pacific Co. did not appear. The demurrer by the Pyles was sustained and an amended complaint was filed and the Pyles thereupon answered. By their answer they claimed the fee simple title to the land and the exclusive possession and right of possession thereof, and denied that the use to which the Milwaukee Co. desired to condemn the property was a public use, and, further, set up the value of the property sought to be taken and the damage that the owners would sustain by reason of condemnation. The Milwaukee Co. thereafter made application under the provisions of sec. 5226 for the appointment of commissioners to assess and determine the damages that the defendants would sustain by reason of the condemnation. After a hearing on the objections and protest made by the defendants Pyle, and in due course of proceedings, the objections were overruled and commissioners were appointed. Subsequent to the appointment of the commissioners, and after giving due notice to all the parties defendant, as required by the provisions of sec. 5226, the commissioners met for the purpose of hearing the evidence and taking proofs and assessing the damages, and the Milwaukee Co. was represented by its counsel, Cullen & Dudley, and the defendants Pyle were represented by C. W. Beale and James A. Wayne; the Northern Pacific, which had never



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appeared in the case, did not appear, and submitted no proofs whatever. After hearing all the proofs, the commissioners made and filed their findings as follows:

“1. That the value of the separate estate and interest of defendants E. E. Pyle and Aletha J. Pyle in and to the land sought to be condemned and appropriated by plaintiff herein for its right of way, situated in Lot 10 of Section 5, Township 45 North, Range 3 East, B. M., being 5.3 acres, with the improvements thereon, is \$3,300.00.

“2. That the value of the separate estate and interest of defendants E. E. Pyle and Aletha J. Pyle in and to the land sought to be condemned and appropriated by plaintiff herein for its right of way, situated in Lot 1 of Section 8 of said township and range aforesaid, being one (1) acre of land, is \$150.00.

“3. That the damages which the said defendants E. E. Pyle and Aletha J. Pyle will suffer by reason of such condemnation, aside from the value of the land and improvements aforesaid, is \$5,000.00.

“4. That the damages which will accrue to the portion of land in lot 10 of section 5 aforesaid, which is not sought to be condemned, by reason of its severance from the portion sought to be condemned, is \$100.00, and that the damages sustained by defendants E. E. Pyle and Aletha J. Pyle thereby is \$100.00.

“5. That the damages which will accrue to the portion of land in Lot 1 of Section 8 aforesaid, which is not sought to be condemned, by reason of its severance from the portion sought to be condemned, is \$150.00, and that the damages sustained by defendants E. E. Pyle and Aletha J. Pyle thereby, is \$150.00.

“6. That the defendants E. E. Pyle and Aletha J. Pyle, by reason of the condemnation and appropriation of said land will sustain damages by loss of their spring and domestic water supply, in the sum of \$500.00.

“7. That the defendants E. E. Pyle and Aletha J. Pyle, by reason of the condemnation and appropriation of said land will sustain damages by being cut off from the waters of the

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St. Joe river, for the purpose of watering their stock and horses, in the sum of \$150.00.

“8. That by reason of the condemnation and appropriation of said lands that the timber standing and growing on the remaining portions of said land not sought to be condemned, will be endangered and decreased in value on account of the increased danger of loss of said timber by fires that may be ignited by the operation and maintenance of said railroad over said strip of land and that the defendants E. E. Pyle and Aletha J. Pyle will thereby suffer damages in the sum of \$150.00.

“9. That the cost of a good and sufficient fence along the line of said railway is \$120.00, and the cost of cattle guards where fences may cross the line of said railroad is \$40.00.

“10. That the portion of said land above described not sought to be condemned will be specially and directly benefited by the construction of said line of railway as proposed by the plaintiff in the sum of \$——.

“11. That the Northern Pacific Railway Company, codefendant herein having been duly and regularly served with notice thereof, appeared not and no evidence, either oral or documentary, was introduced on its behalf.

“WHEREFORE, we, the undersigned commissioners, find from the foregoing that the damages which will be sustained by the defendants E. E. Pyle and Aletha J. Pyle, by reason of the condemnation and appropriation of said lands by the plaintiff herein as described in the amended complaint, are \$9,500.00.

“And we further find that the damages which will be sustained by the codefendant, Northern Pacific Railway Company, by reason of the condemnation and appropriation of said lands as aforesaid will be in no sum whatever.”

After the filing of the report of the commissioners, and on the first of May, 1908, the Northern Pacific Co. made an *ex parte* application to the judge of the district court for an order prohibiting and restraining the clerk from paying to the defendants Pyle the sum of \$9,200 of the award made by the commissioners until such time as the respective rights of the defendants Pyle and the Northern Pacific Ry. Co. in

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and to lot 10 of the land sought to be condemned should be finally determined and adjudicated. The court made and entered the order as prayed for by the Northern Pacific Co., and on the following day the Milwaukee Co. paid the award made by the commissioners over to the clerk of the district court. The Milwaukee Co. thereupon sought to enter upon the premises and commence its work and construction over the lands which it was proceeding to condemn. The Pyles refused to allow it to enter the premises, and thereupon the Milwaukee Co. commenced an action in the district court by filing its complaint praying for a decree entitling it to the possession of the land sought to be condemned, and enjoining and restraining the Pyles from in any way interfering with its work and operation or preventing its entering upon the premises. The district judge thereupon made an *ex parte* order as prayed for by the company, restraining and enjoining the Pyles from in any way interfering with the Milwaukee Co. entering upon the premises and commencing and continuing its construction and the operation of its railroad. Thereafter, and on the 20th day of May, counsel for the Pyles appeared and moved for a dissolution of the restraining order, and after a hearing the original restraining order was continued until such time as the motion could be disposed of, and the motion was taken under advisement and, as it appears from the petition herein, that application has never been passed upon or decided by the court or judge thereof.

By this time, and through these several proceedings, the Milwaukee Co. had succeeded in procuring possession of the land sought to be condemned and of ousting and ejecting the defendants Pyle therefrom without paying to the Pyles any compensation whatever, as required by both the constitution and statute of the state. The Pyles have expressed their willingness to accept, and sought in every manner to procure the sum awarded to them as damages in the manner and method prescribed by sec. 5226, but at all times without avail. After all these proceedings, and upon an order of the district court, the Northern Pacific Co. appeared in the condemnation suit and answered and set up its claim to title in and to the

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lands sought to be condemned, and to this pleading the Pyles answered and the case went to trial, and it was finally determined and decreed by the district court that the Northern Pacific Co. had no interest or right in or to the lands in controversy. Thereafter, and on the 24th day of September, 1910, and over the objections and protests of defendants Pyle, the district court set the condemnation case for trial before a jury as to the amount of damages to which the defendants Pyle were entitled to recover by reason of the condemnation proceedings. It is for the purpose of restraining the court from proceeding to trial of this case, or a trial before a jury, or otherwise, that this application is made.

It is claimed by the petitioners that after the commissioners, who were appointed on the instance and application of the Milwaukee Co., had heard the evidence and made their findings and award and the company paid the award to the defendants, or into court for the defendants, and the defendants were willing to receive and accept the same as just and fair compensation for the property to be taken, the litigation was thereupon ended, and that no subsequent trial as to the question of damages can be had by the company seeking the condemnation. It is insisted by the petitioners that the court has no jurisdiction to proceed further to a trial of the case under such circumstances, and that to do so would be a violation of the purpose and intent of the condemnation statute of this state, and an excess of jurisdiction.

Now, in the first place, it is clear, beyond doubt, that the Milwaukee Co. seeking to condemn this land had no right whatever to enter upon and take possession of the premises until it either paid "to the defendants" the amount assessed and found by the commissioners as damages, or in case the defendants refused to receive the same, then paid the sum "to the clerk of the court to abide the result of the action." This is the express provision of the statute as embodied in the latter part of sec. 5226. (See, also, *Portneuf Irr. Co. v. Budge*, 16 Ida. 116, 100 Pac. 1046.)

The real and decisive question, however, with which we are confronted in this case is that as to whether a condemn-

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ing company, availing itself of the statute of eminent domain, after securing the appointment of commissioners and paying to the defendants or into court the award made by such commissioners in accordance with sec. 5226, can thereafter have the question of damages submitted to a jury under the provisions of secs. 5220 and 5221. If the condemning company can do so, then of course the trial court had the jurisdiction to set this case for trial before a jury; if they cannot do so, then no jurisdiction existed, and the writ should be made permanent in this case.

Under the constitution, sec. 14, art. 1, private property may not be taken for public use until after a just compensation has been ascertained and paid therefor. Now, the statute,—in particular secs. 5220 and 5221,—provides for ascertaining and assessing the damages which the property owner will sustain by reason of the taking of his property, and this may be done before a jury, and the right to have a jury trial is common to both the condemning party or company and the land owner. This method, however, is not as speedy and summary as may sometimes be desired, and so the legislature incorporated a proviso in sec. 5226 to the effect that at any time after the commencement of the proceedings in the district court the *condemning party* may, upon ten days' notice to the adverse party, apply for the appointment of commissioners to assess and determine the damages, and that after the making of such an assessment and filing of the report, if the plaintiff sees fit to pay to the *defendant* the amount assessed and found by said commissioners as damages or, *in case the defendant refuse to receive the same, deposits the amount with the clerk of the court to abide the result of the action*, the plaintiff may have possession of the premises. It was held by this court in *Portneuf Irr. Co. v. Budge* that the provisions of sec. 5226 are constitutional, and when complied with amount to an ascertainment "in a manner prescribed by law" of the just compensation to which the land owner is entitled. And so the court held in that case that when damages have been ascertained by commissioners in accordance with this proviso contained in sec. 5226 and the sum assessed

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has been paid or tendered, the constitutional requirement has been fully met. It was further held in that case that the right of the land owner to refuse the award thus made and to go before a jury for the assessment of damages, or even to appeal, are not constitutional rights guaranteed him, but are purely grants by the legislature of privileges and additional remedies to which he might otherwise not be entitled.

Subd. 6, sec. 5216, requires that in order for a complaint in condemnation to state a good cause of action, it must contain "in all cases where the owner of the lands sought to be taken resides in the county in which such lands are situated, a statement that the plaintiff has sought, in good faith, to purchase the lands so sought to be taken, or settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor, or settlement of such damages." This is required on the theory that if the parties can make a contract themselves and agree on the value of the property and the damages sustained, there will be no occasion for the intervention of the court. If no such agreement can be made, then the parties resort to the courts.

When the Milwaukee Co. commenced its action, it might have proceeded to trial before a jury in the usual and ordinary manner. This it did not see fit to do. On the contrary, it applied for, and over the protests and objections of the defendants secured, the appointment of commissioners. This the statute gave it a right to do. After the assessment of damages by the commissioners the company was not obliged to pay the award if it was dissatisfied with the amount assessed, but might have gone before the court and a jury and had the damages assessed in the usual way. The payment of the award made by the commissioners was wholly voluntary on the part of the plaintiff. As soon as the payment was made, which was voluntary on the part of the plaintiff, and after it was voluntarily accepted by the defendants on their part, this constituted an agreement and contract and closed the transaction, and entitled the plaintiff to its decree of condemnation without any further proceedings. This seems to

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be the unmistakable purpose and intent of the statute as embodied in sec. 5226, Rev. Codes. But it may be argued that under this holding, if the land owner accepts the payment of the award made by the commissioners, he thereby loses the right to have the assessment made by a jury and also the right to appeal, or, to put it in a slightly different form, that the land owner does not receive the compensation which has been ascertained before the taking of his property in a case where he desires to have a reascertainment of it by a jury or to avail himself of his right to an appeal. This is in a sense true, but the constitution only guarantees him such a "just compensation" before the taking of his property as may "be ascertained in a manner prescribed by law." Now, since it has been held that the ascertainment of a just compensation by commissioners appointed and acting in conformity with the provisions of sec. 5226, Rev. Codes, fully meets the requirements and demands of this constitutional provision, the land owner is getting just what the constitution guarantees him whenever he is tendered and accepts the award made by the commissioners. However, the statute has given him a further guaranty and safeguard should he be dissatisfied with this award. But as said by this court in *Portneuf Irr. Co. v. Budge*: "He is not obliged to invoke it. He may exercise his pleasure in availing himself of this right." As we view the statute, if he sees fit to avail himself of a right of trial by jury or appeal, he must allow the compensation paid by the plaintiff to remain with the clerk "to abide the result of said action." If it had not been intended by the statute that a receipt of the award made by the commissioners would be a waiver of further defenses and settle the litigation, we cannot understand why the statute would have provided for paying the award to the clerk in case the defendant refused to accept it. Certainly the defendant would never refuse to accept the award if the acceptance is no waiver of any of his rights of defense. The statute says that the company shall, if it desires possession of the premises, pay the money "to the defendant"; and if the defendant refuses to accept, then plaintiff must pay it to the clerk. Here it did not offer it

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to the defendants, who were willing to take it, and in fact clamoring for it, but it paid it to the clerk, who had previously been enjoined by the court, on the application of the Northern Pacific Co., from paying it over to the defendants until the question of title might be settled between the Pyles and the company. It is noteworthy that at the very time these proceedings were being had, the report of the commissioners was on file, finding that the Pyles were entitled to the sum of \$9,500 damages, and that the Northern Pacific Co. was not entitled to any damages; that it had not appeared and had not introduced any evidence whatever showing that it was entitled to any damages or claimed any damages. The Milwaukee Co. could not pay into court the award made by the commissioners and then take possession of the premises, and thereafter, on its own motion and initiative, procure a trial by jury as to the amount of damages to which the defendants are properly entitled. The option to have a trial by jury is left to the defendants, the land owners. If they are dissatisfied with the award made by the commissioners, they are not obliged to receive or accept the tender made by the plaintiff, but may refuse to accept the award and go into court and call for a jury to determine and assess the damages.

Two options with reference to the assessment of damages are given to the parties by the provisions of sec. 5226: First, the plaintiff may apply for the appointment of commissioners, and if satisfied with the award made and desirous of taking immediate possession of the premises, may pay that sum to the defendant,—or if the defendant refuses to accept it, then to the clerk,—and thereupon take possession of the property. Second, if the defendants are satisfied with the award, they may accept it and thus terminate the transaction, or if dissatisfied with the award, they have the option of a trial by jury before the court for the assessment of the damages they will sustain. It has already been held by this court that the use, necessity and all the requirements of sec. 5213, Rev. Codes, should be tried and found by the court before commissioners are appointed at all. (*Portneuf Irr. Co. v. Budge, supra.*)



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Opinion of the Court—Ailshie, J.

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It would be trifling with justice and the rights of property owners to allow a company, endowed with the powers of eminent domain, to come into court, procure the appointment of commissioners, pay the award made into the court, take possession of the defendant's property, and thereafter put the defendant to the annoyance and expense of a trial before the court and jury when the defendant is already willing to accept the award which has been made and upon which plaintiff has taken possession of his property.

The only thing left in this case for the court to do was to order the money paid by the Milwaukee Co. to the clerk delivered over to the defendants Pyle and to enter a decree against the Pyles condemning the property to the use for which it was sought.

It is urged, however, that no authority is conferred by the statute to enter a decree or a final judgment on the award of commissioners, and that consequently no such authority exists. To our minds, there are two answers to this, either one of which is sufficient: First, if the money is paid by the plaintiff and accepted by the defendant, a decree following upon this action taken by the respective parties will be in substance a decree by consent or confession and will come as fully within the purview of the statute as if the case had gone to trial before a jury and judgment and decree had been entered on the verdict. Second, the statute, sec. 5226, confers all the jurisdiction necessary to a hearing and assessment of damages, and while it does not specifically point out the manner of entering judgment in a case where the award is accepted, we think all the means necessary to carry into effect the proceedings had is conferred by the general statute, sec. 3925, which reads as follows:

“When jurisdiction is, by this code or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”

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Points Decided.

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The court had no jurisdiction to set the case for trial before a jury under these circumstances. The motion to quash is overruled, and the writ is made perpetual. Costs of this proceeding are awarded in favor of the plaintiffs Pyle and against the defendant, to be paid by the Chicago, Milwaukee & St. Paul Ry. Co. of Idaho, the real party in interest in this case.

Sullivan, C. J., concurs.

Petition for rehearing denied.

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(November 28, 1910.)

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. OF IDAHO, a Corporation, Appellant, v. WILLIAM TRUEMAN and ANNIE M. TRUEMAN, His Wife, and ALBERT WUNDERLICH and MILDRED WUNDERLICH, His Wife, Respondents.

[112 Pac. 210.]

CONDEMNATION PROCEEDING—AWARD OF DAMAGES—AWARD BY COMMISSIONERS—DISMISSAL OF PROCEEDING—COSTS.

(Syllabus by the court.)

1. Sec. 5228 of the Revised Codes, which is a part of the title on eminent domain, makes the general provisions of the Code relative to "civil actions" applicable to proceedings under the eminent domain title, except as otherwise specially provided; and sec. 4354 of the Rev. Codes dealing with actions generally, provides that, "An action may be dismissed or a judgment of nonsuit entered . . . by the plaintiff himself, at any time before trial, upon the payment of costs: Provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant"; *held*, that the latter section is applicable to actions and proceedings in eminent domain and authorizes the plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award the damages or at any time before trial.

2. A dismissal of an action as authorized by subd. 1 of sec. 4354, Rev. Codes, "is made by an entry in the clerk's register."

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Argument for Appellant.

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3. By the provisions of sec. 5227, Rev. Codes, costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court"; *held*, that where a plaintiff commences an action in condemnation and procures the appointment of commissioners and has a hearing, and the commissioners make an award and file their findings and report, and the plaintiff refuses to pay the award and thereafter dismisses the action, all costs usually taxed in civil actions should be taxed against the plaintiff, and that it would be an abuse of discretion not to do so under such circumstances, and that the provisions of the general statute relative to costs in "civil actions" would apply in such case.

4. Where a plaintiff in condemnation has, subsequent to the filing of the report of the commissioners appointed to assess the damages, dismissed the action under the provisions of subd. 1, sec. 4354, the defendants must file their memorandum of costs within five days after notice of the dismissal as provided by sec. 4912 of the Rev. Codes.

APPEAL from the District Court of the Eighth Judicial District, in and for the County of Kootenai. Hon. Robert N. Dunn, Judge.

Proceeding in condemnation. Judgment on findings and report of commissioners and award of damages. From decree and judgment and order refusing to vacate decree and judgment plaintiff appealed. *Reversed*.

J. L. McClear, Edwin McBee, and F. M. Dudley, for Appellant.

The claim for costs incurred in the proceedings before the commissioners is untenable. (5 Ency. P. & P. 110, and cases cited.) There is no statutory authority for charging witness fees or other expenses as costs in proceedings before commissioners appointed in a condemnation proceeding. (Secs. 5227, 6139, Rev. Codes.)

In *McCready v. Rio Grande W. Ry. Co.*, 30 Utah, 1, 83 Pac. 331, 8 Ann. Cas. 732, the supreme court of Utah, construing sections of the Utah statute relating to costs, identical with secs. 5227 and 5228, Idaho Rev. Codes, held that the term "costs" includes only such costs and fees as are fixed and regu-

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Argument for Appellant.

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lated by statute. (*Bergman v. St. P. etc. R. Co.*, 21 Minn. 533, 534; *City of St. Louis v. Menitz*, 107 Mo. 611, 18 S. W. 30.)

The witnesses before the eminent domain commissioners were not "witnesses in civil actions in the district court or before any referee"; neither were they witnesses before a "commissioner thereof," within the meaning of sec. 6139. The attendance of witnesses before such forum is purely a matter of grace or favor from the witness to the one party or to the other. (*San Jose etc. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.)

If, as respondents contend, the commissioners' report was a verdict or decision, then under sec. 4912 the cost bill should have been filed and served within five days after the making of the award, and the respondents, having failed to file such cost bill, waived all claim for such costs, even if a valid claim would otherwise have existed. (*Cantwell v. McPherson*, 3 Ida. 321, 29 Pac. 102.)

"In the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." (2 Lewis, Eminent Domain, 3d ed., sec. 955; 7 Ency. of P. & P. 674; 15 Cyc. 935; *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161, 172; *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444; *Denver etc. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582; *Blackshire v. A. T. & S. F. R. Co.*, 13 Kan. 514; *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26; *Manion v. Louisville etc. R. Co.*, 90 Ky. 491, 14 S. W. 532, 533; *Matter of Rhinebeck & C. R. Co.*, 67 N. Y. 243; *St. L. & G. Ry. Co. v. C. G. & T. etc. Ry.*, 126 Mo. App. 272, 102 S. W. 1042; *United States v. Dickson*, 127 Fed. 774.)

The service and filing of the praecipe for the dismissal of the proceedings was a sufficient manifestation of appellant's purpose to abandon and discontinue the same. (2 Lewis, Eminent Domain, 3d ed., sec. 956.)

Aside from the discontinuance and abandonment of this proceeding, the court was without jurisdiction to enter the

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Argument for Respondents.

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so-called judgment and decree of appropriation, for the reason that there had been no trial or judicial determination of the damages. Sec. 5215, Rev. Codes, provides that "all proceedings under this title must be brought in the district court."

The powers conferred by sec. 5219 are, in express terms, conferred upon the "court." By the provisions of sec. 5220 the testimony is to be heard, and the damages assessed, by "the court, jury or referee." Upon the verdict of the jury, or the finding of the court or referee, if a jury be waived, the court is to enter a "final judgment." (Sec. 5223, Rev. Codes; *Cal. So. Ry. Co. v. S. P. Ry. Co.*, 67 Cal. 59, 7 Pac. 123, 125, 126.)

Ezra R. Whitla, and Charles L. Heitman, for Respondents.

The statutes of this state provide for the dismissal of certain actions upon the payment of costs, but as the plaintiff admits in this action that it has not paid the costs, it cannot claim the right to dismiss. If it should claim the right to dismiss other than under the statutory proceedings, the only way this can be done is, as shown in the cases cited by the appellant itself, by making application to the court and securing an order therefor. (*Grunert v. Speich*, 114 Wis. 355, 89 N. W. 496.)

"The dismissal of civil actions in the district court is in the nature of a judgment and necessarily requires an order of the court therefor." (*State v. Ludwig*, 106 Wis. 226, 82 N. W. 158; *Allen v. Dodson*, 39 Kan. 220, 17 Pac. 667; *Haskell v. Whitney*, 12 Mass. 47; *Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692.)

The appellant's showing admits that the motion for judgment was regularly served on the resident attorney, J. L. McClear, and that this service was proper, and no showing has been made which would warrant the court in setting aside the judgment on this ground. (*Beck v. Lavin*, 15 Ida. 363, 97 Pac. 1028.)

The right to discontinuance of a condemnation proceeding is not an absolute right, and the plaintiff, after having proceeded to condemn, has no right to come in and demand an

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Opinion of the Court—Ailshie, J.

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absolute dismissal of the action, and an application for a discontinuance may be denied or equitable terms imposed. (Lewis, Eminent Domain, p. 670, and cases there cited; *Drath v. B. & M. R. Co.*, 15 Neb. 367, 18 N. W. 717.)

The award of the appraisers in a condemnation proceeding is the adjudication of the damages by a competent tribunal, and if no proceedings are taken to vacate the award it becomes, to an extent, in the nature of a judgment. (*Stauffer v. C. R. & M. R. Co.*, 33 Ind. App. 356, 70 N. E. 543; 2 Elliott on Railroad Law, par. 1045; *E. & T. R. Co. v. McGrath*, 74 Cal. 49, 15 Pac. 360.)

A leading case upon the question of a dismissal of a condemnation proceeding is that of *Sprague v. N. P. Ry. Co.*, 122 Wis. 509, 106 Am. St. 997, 100 N. W. 842, decided under the statutes of Wisconsin, which appear to be more like the statutes of this state than any other.

**AILSHIE, J.**—A motion has been made to strike out certain portions of the transcript and motion has also been made to dismiss the appeal. We have examined these motions and have reached the conclusion that they are not well taken. The motions are denied.

This is an appeal from a final decree of condemnation and an order denying a motion to vacate and annul the decree. On the 24th day of January, 1908, the appellant company filed its complaint in the district court in and for Kootenai county, praying the condemnation of the south thirty feet of lot 10, block 1, in the townsite of St. Maries, for railroad purposes. Summons was issued and served, and at the same time notice was served on the defendants, who are respondents here, that the plaintiffs would apply to the court for the appointment of commissioners to assess and determine the damages that defendants would sustain by reason of the condemnation of the land described in the complaint. Commissioners were thereafter duly appointed, and after a hearing at which plaintiffs and defendants were represented and introduced proofs, the commissioners made and filed their findings and report. They found the value of the land sought to be con-

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Opinion of the Court—Ailshie, J.

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demned to be \$1,200, and that the damages that would accrue to the balance of the lot, buildings and improvements thereon, by reason of the condemnation would amount to \$5,000. On May 11th following the plaintiff company filed with the clerk of the court its praecipe for the dismissal of the proceedings. Notice of this praecipe was served on the attorney for the defendants. No further action was taken in the matter until about September 21, 1909, when a notice of motion for judgment against the plaintiff was served on J. L. McClear, the local attorney at Coeur d'Alene city for the railroad company. This notice was forwarded by Mr. McClear to the general counsel at Spokane, and in the course of business was delayed and overlooked, and so no appearance was made on the day set for hearing, which was September 29th. On the latter date the motion was called up by the defendants, and on their application a final decree of condemnation was ordered upon the report of the commissioners, and thereafter and on October 9th a judgment was entered against the company for the amount of the award and a final decree of condemnation was entered. On October 15th the plaintiff moved for a vacation and annulment of the judgment and decree on several grounds, among which was: First, that the court was without jurisdiction to enter the judgment and decree; second, that the action had been dismissed long prior to the entry of judgment and decree.

The first question presented by the appellant deserving our consideration here is, that it had an absolute right, under sec. 4354 of the Rev. Codes, to dismiss the action. That section provides as follows:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of costs: Provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon."

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Sec. 5228, Rev. Codes, which is a part of the title on eminent domain provides as follows:

“Except as otherwise provided in this title, the provisions of this code relative to civil actions and new trials and appeals, are applicable to, and constitute, the rules of practice in the proceedings in this title.”

It will be observed that this latter section makes the provisions of the code relative to civil actions applicable, “except as otherwise provided in this title,” to proceedings in condemnation. Now, in civil actions, under sec. 4354, *supra*, the plaintiff may dismiss, upon payment of costs, at any time before trial, provided a counterclaim has not been made or affirmative relief sought. No counterclaim had been filed and no affirmative relief had been sought in this case, and we are clearly of the opinion that the plaintiff had a right to dismiss. (*Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299.) So far as the record shows in this case no dismissal was ever entered. The statute, however, sec. 4354, provides that “the dismissal mentioned in the first two subdivisions” of this statute “is made by an entry in the clerk’s register.” It does not appear from the transcript that any entry of the dismissal has either been made in the clerk’s register or any formal judgment has been entered. The failure to make such entry would not affect the plaintiff’s right to have the action or proceeding dismissed. It has been argued by the respondent, however, that the appellant was not entitled to the dismissal because he did not pay the costs, while it is urged by the appellant that there were no costs to pay. In the absence of a positive showing to the contrary, we assume that the plaintiff when applying to the clerk for a dismissal of the action paid the costs of the dismissal. Under the construction placed on the California statute, from which our section 4354 was taken, it has been held unnecessary for a plaintiff making a dismissal under subd. 1 of this statute to, at the time, actually pay more than the costs of the dismissal and that the other costs follow the dismissal as a matter of law and must be taxed in the ordinary way, and that it was the intention of the statute that



## Opinion of the Court—Ailshie, J.

when ascertained, they should be entered as a judgment against the plaintiff. (*Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299.) But appellant contends that in a proceeding for condemnation no costs are taxable at all. To this contention we cannot give our assent. Appellant's contention seems to us contrary to both the letter and the spirit of the statute. By the provisions of sec. 5227, costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties, on the same or adverse sides, in the discretion of the court." This provision of the statute was evidently written with a view that the case would go to final judgment after a regular trial had. It would clearly be an abuse of the discretion of the trial court, under this statute, to refuse to allow a defendant costs where the plaintiff had procured the appointment of commissioners and had a hearing, entailed all the costs incident to the production of witnesses and attendance on the meeting of the commissioners, and then had dismissed the action as was attempted to be done in this case. Where the action is dismissed under these conditions, it would clearly be the duty of the trial court to tax the costs against the plaintiff, and the provisions of sec. 5228 making applicable the general statutes relative to civil actions would apply in the taxing of costs. The usual costs in civil actions would be taxable. It would be necessary for the defendants to file a cost bill within five days after notice of the dismissal, as provided by sec. 4912, Rev. Codes.

From what has already been said it follows that the court erred in entering a decree of condemnation and a judgment on the findings and report of the commissioners. The plaintiff had already complied with the statute in order to entitle it to a dismissal of the proceeding. It would also follow from the holding of this court in *Pyle v. Woods*, ante, p. 674, 111 Pac. 746, decided at this present term, that the court would have had no authority to enter a judgment over the objection of plaintiff on the findings of the commissioners. The condemning company was not obliged to pay the award made by the commissioners, and even though it did not desire

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Points Decided.

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to dismiss the proceeding it would still have had a right to apply to the court for a jury trial to assess the damages. The judgment and order appealed from are reversed, and the cause is remanded with direction to the trial court to dismiss the action. Costs of this appeal are awarded in favor of appellant.

Sullivan, C. J., concurs.

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(November 30, 1910.)

**CHARLES MIX, Appellant, v. THE BOARD OF COUNTY COMMISSIONERS OF NEZ PERCE COUNTY, Respondent.**

[112 Pac. 215.]

**LOCAL OPTION LAW—CITY CHARTER—AMENDMENT OF—INTOXICATING LIQUORS—AUTHORITY TO REGULATE—CITY COUNCIL—CONSTITUTIONAL LAW—SPECIAL ACT—GENERAL LAW.**

(Syllabus by the court.)

1. Under the provisions of the constitution, the special charter of the city of Lewiston may be amended by a special law enacted for that specific purpose, or by a general law which declares a state policy concerning police regulations or in regard to matters affecting the state at large.

2. Ordinances providing for the pavement of streets, construction of sewers and levying assessments to pay therefor are matters of local concern, and the special charters of the cities of this state in regard to such local matters can be amended only by special law.

3. *Boise City National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93, cited and distinguished.

4. Whenever the legislature enacts a general law declaring a state policy in regard to the prohibition of gambling or the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the state have been given in regard thereto.

5. *In re Eidenbaugh*, 5 Ida. 377, 49 Pac. 12, cited and approved.

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**Argument for Appellant.**

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6. Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state.

7. The law known as the local option law (Sess. Laws 1909, p. 9), *held* to be a general law declarative of the policy of the state in regard to traffic in intoxicating liquors.

8. A special law is one that applies only to a special locality or to an individual or to a number of individuals selected out of a class to which they belong.

9. A general law is one framed in general terms, restricted to no locality and operating upon all alike.

10. Sec. 7 of the local option law prohibits the board of county commissioners of any county where said law has been adopted from granting any person, firm, association, corporation or club a license to sell or dispose of intoxicating liquors within such county.

11. Under the provisions of sec. 63 of the special charter of the city of Lewiston, said city is prohibited from issuing a license authorizing anyone to do any act or engage in any business which is made unlawful by the general laws of the state.

12. The phrase "law of the land" as used in said section includes the general laws of the state.

13. The legislature by enacting the special charter of the city of Lewiston did not delegate to said city the authority to license persons to sell intoxicating liquors within such city contrary to the general law of the state.

14. When the general law prohibits or makes a certain business criminal, the city cannot make such business lawful by licensing it.

**APPEAL** from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Proceeding in the district court for a writ of mandate to the board of county commissioners to compel them to issue a license to petitioner authorizing him to engage in the business of retailing intoxicating liquors in the city of Lewiston. Writ denied and judgment of dismissal entered. *Affirmed.*

Chas. L. McDonald, and Eugene A. Cox, for Appellant.

If any specific question, which is not plainly and exclusively local, is deemed by the legislature to be a proper subject for the announcement of a state policy, by a general criminal law, universally applicable throughout the state, then such question is thereby withdrawn from the jurisdiction and control of the local governments, at least to the extent that they

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Argument for Appellant.

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cannot nullify the state's policy, or promulgate a contrary rule, and the law declared by the legislature is the universal rule within the state, and supersedes all special acts and the regulations of the local authorities thereunder. (*In re Ridenbaugh*, 5 Ida. 371, 49 Pac. 12.)

On the other hand, where the legislature refuses to declare a universal policy for the whole state in regard thereto, or where the subject matter treated is one necessarily of local concern, and the legislature is merely formulating the agencies, instrumentalities and procedure by which the matter may be handled by the local authorities, then, in such case, the legislature by its own act classes the subject treated as one of local concern, and being a matter of local concern, the method of amending the charter by specific act is pointed out by the constitution, and constitutes a limitation upon the power of the legislature. (*Boise City Nat. Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93.)

Under the 1907 charter the city was given complete power over the liquor traffic, and by the initiative and referendum clauses was created an independent local option district, and the first local option election in Idaho was held under the charter prior to the passage of the general local option law and prohibition was defeated. The general local option law contains no reference to the special charter, and the question therefore arises as to whether the later general act will repeal the earlier special law. (*State ex rel. St. Paul Gas Light Co. v. McCardy*, 62 Minn. 509, 64 N. W. 1133; *Pierce County v. Spike*, 19 Wash. 652, 54 Pac. 41; *Seattle M. & Ry. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835; *University of Utah v. Richards*, 20 Utah, 457, 59 Pac. 96; *Atchison T. & S. F. R. Co. v. Haynes*, 8 Okl. 576, 58 Pac. 738; *People v. Pac. Imp. Co.*, 130 Cal. 442, 62 Pac. 739; *Banks v. Yolo County*, 104 Cal. 258, 37 Pac. 900; *State v. Sturgess*, 10 Or. 58; *In re Murdock*, 149 Pa. 341, 24 Atl. 222; *State v. Linquist*, 77 Minn. 540, 80 N. W. 701; *Territory v. Evans*, 2 Ida. 651, 23 Pac. 232, 7 L. R. A. 646; *Boise City National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93.)

## Argument for Appellant.

Art. 12, sec. 1 of the Idaho constitution was adopted from art. 11, sec. 6 of the California constitution of 1879, but in adopting this clause our constitutional convention struck out the phrases providing that the special charter cities should be subject to general laws, and modified our art. 11, sec. 2, and art. 3, sec. 19, which were also taken from the California constitution, thus leaving the special charter cities subject only to the operation of such general laws as must apply to them by *necessary implication*.

In Idaho the first cities were mining towns, remote from any central authority. They assumed of necessity large powers of self-government, and the legislature and people of the state came to regard this local independence as naturally right. In theory, through the medium of special acts, they were subject to almost unrestrained legislative power. In practice, no special charter has ever been amended in the history of the territory or state except at the request of the people living under it. From the earliest days these cities were clearly set apart as local independent governments. (Charter of 1863, art. 7, secs. 8 and 9; Washington Ter. Sess. Laws, Local and Private Laws, p. 51; Charter of 1881, chap. 2, sec. 26, Ida. Sess. Laws 1881, p. 390; Charter of 1903, sec. 57, Sess. Laws 1903, p. 126; Charter of 1907, sec. 233, Sess. Laws 1907.)

The constitution perpetuated the relations already established. The charter cities were exempted from general laws and the medium of amendment by special laws was preserved. This court has held that the legislature cannot even *supplement* the charters by general laws relating to local government. (*Boise City National Bank v. Boise City*, *supra*.)

The local option law is merely a statute general in form but dealing with matters adjudged by the legislature at the present time to be local. There is no express power in the constitution to enact laws like the local option law. It clearly belongs to that large class of legislation based upon principles of local self-government, to which class also belong laws like the Herd District Law, Irrigation District and Road District

## Argument for Appellant.

Laws, Rural High School Laws and laws relating to cities, precincts, or other local governments. (Cooley's Con. Lim., 7th ed., pp. 65, 173, 174, 243, 263, 264; Freund, Police Power, sec. 217, p. 205; *Feek v. Township Board*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; *State v. Noyes*, 30 N. H. 279-292.)

The power of the legislature to amend the charter of Lewiston by special act is an express constitutional power. The power of the legislature to supersede the charter powers by a general state law is *implied*.

Where a question is adjudged by the legislature to be local, no state policy is involved, and necessarily no implication of the legislative power to amend the city charter arises.

If the legislature can deprive the city of Lewiston of its charter power to license the sale of intoxicating liquors by a local option law, it can, in like manner, deprive the city of its charter power to prevent animals from running at large by a county herd district law, or abolish the city's police by a system of county police, as was done at one time in New York and Philadelphia, or deprive the city of its control of its streets by a county good roads district law, and thus the legislature may be permitted by indirection, and, perhaps, even without intent, to accomplish what is expressly forbidden by the constitution.

It may be contended that the local option law expresses a policy of the state to submit this matter to the counties for determination. The decision to submit it at all involves a previous determination that it is a local question. It is also a question with which the special charter cities are expressly empowered to deal. There can, therefore, be no state policy of encroachment upon these local charter powers. The state may constitutionally declare that a certain subject shall no longer be a matter of local regulation. It cannot under the constitution declare that a certain subject of local regulation embraced within the charter of Lewiston shall be taken out of the control of the people of that city and decided by the people of Nez Perce county.

The only constitutional protection which the special charter cities have is exemption from general laws. (*Ex parte*

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*Braun*, 141 Cal. 204, 74 Pac. 780; *Ex parte Helm*, 143 Cal. 553, 77 Pac. 453; *City of Los Angeles v. Independent Gas Co.*, 152 Cal. 765, 93 Pac. 1006; *Ex parte Diehl*, 8 Cal. App. 51, 96 Pac. 98.)

D. C. McDougall, Atty. Gen., D. E. Hodge, County Atty. of Nez Perce County, J. H. Peterson, and O. M. Van Duyn, for Respondent.

It appears from sec. 63 of the Lewiston charter that the city was never granted the absolute power to regulate its own saloons without reference to the law of the state. The local option law, therefore, could not be construed as an amendment to this city charter, because the state has always reserved in itself the ultimate right to govern the liquor traffic. It has never vested this power exclusively in the municipalities of the state.

The argument of counsel based upon the case of *Boise National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93, is not in point. In that case, there being purely a local question involved, the court held that a special charter could not be amended by a general act. But even if it be granted, for the sake of argument, that the local option law, if made to apply to a special charter city, operates as an amendment of its charter, yet the state has the right to pass a general law in certain instances modifying or amending special charters.

Sec. 2, art. 12 of the constitution prohibits the making and enforcing of an ordinance in conflict with the general law. (*In re Ridenbaugh*, 5 Ida. 371, 49 Pac. 12.)

The local option law is a general law. (*Gillesby v. Board of Commissioners*, 17 Ida. 586, 107 Pac. 71.)

The intent of the legislature to make the local option law apply to charter cities and other territory within counties which have voted "dry" is made obvious by the language of sec. 7 of the local option statute.

SULLIVAN, C. J.—This appeal involves the judgment and order of the trial court in refusing to grant a writ of mandate to the board of county commissioners of Nez Perce county,

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commanding them to issue a license to the appellant, authorizing him to engage in the business of retailing intoxicating liquors in the city of Lewiston. The action was brought to determine the applicability of the local option law to the territory included in the city limits of Lewiston. It is alleged in the petition that the city is operating under a special act or charter; that the petitioner has been engaged for several years last past in the liquor business in said city, and that he now holds a license from that city; that he applied to the county commissioners for a renewal of his county and state licenses, and that such renewal was refused on the sole ground that a local option election was held in the county of Nez Perce on March 9, 1910, at which election the canvassers found that the majority of the votes cast were in favor of the proposition submitted and that the board was thereby deprived of discretion to issue the license applied for. A general demurrer was interposed to the complaint or petition, which was sustained by the court and a judgment of dismissal was entered. This appeal is from that judgment.

*In limine*, we desire to say that the oral argument of Eugene A. Cox, of counsel for appellant, which was submitted to the court in typewriting, shows a great deal of thought, study and painstaking research, and is a very valuable historical treatise, and deserves special mention in this opinion. It is instructive and valuable for its clear and well-reasoned argument, and it traces the history of special charter cities from their early existence down to the present time. It is a splendid production, and ought to be preserved in proper form for the benefit of anyone who may be interested in that subject.

The main question presented is: Does the act known as the local option law (Sess. Laws 1909, p. 9) apply to the city of Lewiston? It is contended by counsel that sec. 63 of the special charter of the city of Lewiston (Sess. Laws 1907, p. 349) gives that city the absolute power to regulate or prohibit the sale of intoxicating liquors within said city, and that the local option law, though adopted by the electors of the county, can in no manner affect the right of the city to



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control the traffic in intoxicating liquors. Said section 63 is as follows:

“The mayor and council shall have full power and authority: . . . . To license, regulate, restrain and prohibit for cause places where intoxicating beverages are sold, and all offensive and dangerous trades, occupations, employments or businesses, and for the purpose of this act to define what are offensive and dangerous trades, employments, occupations, or businesses; to limit and define the districts within the city within which intoxicating liquors may be sold, and any dangerous or offensive occupation carried on; but this section does not empower the city of Lewiston to declare a trade, employment, occupation or business offensive or dangerous contrary to the common understanding of the subject, nor to authorize anyone to do any act or engage in any business contrary to the law of the land.”

In determining the questions involved, the method or manner of amending said special charter under the provisions of the state constitution must be considered.

It appears from the record that the city of Lewiston was created by an act of the legislature of Washington territory in 1863, prior to the creation of Idaho territory, it then being a part of Washington territory. That city's existence was recognized by the territory of Idaho, and its charter was continued in force by sec. 2 of art. 21 of the state constitution, which is as follows:

“All laws now in force in the territory of Idaho which are not repugnant to this constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.”

Sec. 1 of art. 12 of the constitution provides for the organization of cities not operating under special charters, as follows:

“The legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated, may become organized under

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such general laws, whenever a majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the legislature."

Sec. 2 of art. 11 of the constitution provides as follows:

"No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be, under the control of the state; but the legislature shall provide by general law for the organization of corporations hereafter to be created; *Provided*, That any such general law shall be subject to future repeal or alteration by the legislature."

It is contended by counsel for appellant under the provisions of sec. 2, art. 11, of our constitution and the decisions of this court, that the charter of the city of Lewiston can be amended in two ways only: First, by special act for that specific purpose; and, second, by a general criminal law or a law treating a subject matter of proper state control and declarative of a state policy; that the latter method is not express but arises by necessary implication from the nature of state and city government; that cities are organized to deal with local questions, the state with problems and policies of a more general nature; that before this implied method of amending the charter is applicable, it must appear that the legislature has adjudged some subject to be proper for state regulation and has declared a state policy with respect thereto.

We are in accord with that contention of counsel. In *Boise City National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93, this court had under consideration the authority of that city to construct sewers and to levy assessments for the payment thereof, and to regulate those matters in which the local community alone was interested, and the court there held that the provisions of the city charter must control and not the general law of the state. The court said: "In the case at bar, it is clear that the construction of sewers and the levying of assessments for the payment therefor are matters of local concern in which the local community is alone interested and in which the state at large has no special interest." The

question presented for decision in that case was whether the provisions of the Boise City charter of 1907 in regard to constructing sewers and assessing the property benefited and collecting from the property owners the cost thereof was the exclusive law by which those things must be done, or whether that charter was supplemented by the act of 1905 (Sess. Laws 1905, p. 113). It will be observed that the Boise City charter of 1907 was re-enacted and amended about two years subsequent to the general law of 1905, which law provided a complete method for building sewers and assessing the property benefited and collecting from the property owners the cost thereof, and applies to cities incorporated under the general law of the state. We held in that case that the special charter of Boise City could not be amended by general law, but that holding was applicable to the facts of that case, and the facts involved were relative to the construction of sewers and the levying of assessments for the payment therefor, and the court there held that that matter was of local concern, in which the state at large had no special interest, and as to those matters the charter could be amended only by special law.

Sec. 2 of art. 12 of the constitution is as follows: "Any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Said section was construed by this court in *Re Ridenbaugh*, 5 Ida. 375, 49 Pac. 12, under the following facts: The city of Boise, operating under a special charter which gave it the right to regulate gambling, licensed Ridenbaugh to operate a gambling game in said city. While he was operating under said license, he was arrested under a general law of the state prohibiting gambling, and as a defense to said action he plead the license granted to him by the city of Boise. The court in passing upon that case said:

"It was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. The cardinal rule in construing constitu-

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tional, as well as statutory, provisions, is to discover and enforce the intention of those who made them. . . . It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state."

The real distinction between the case of *Boise City National Bank v. Boise City*, *supra*, and the Ridenbaugh case, is that the former involved a mere matter of local self-government and the latter a state policy, prohibiting gambling in the state. Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state. Sec. 2, art. 12, of the state constitution prohibits special charter cities from making or enforcing any local, police, sanitary or other regulation that is in conflict with its charter or the general law of the state.

But it is contended that the local option law is not a declaration of a state policy; that it is not a general law; that it is local and special, and applicable only to the counties that adopt it; hence in no manner amends the special charter of the city of Lewiston.

The local option law is made applicable to every county in the state alike, and its provisions become operative in any county upon the electors of such county complying with its provisions and holding an election to determine whether the sale of intoxicating liquors as a beverage shall be prohibited, and if at such election the majority of the electors vote in favor of prohibiting such sale, the law becomes operative in the county as provided by said act.

A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality. (*State v. Cal. Min. Co.*, 15 Nev. 234.) A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates

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equally upon all subjects for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology. (*Ladd v. Holmes*, 40 Or. 167, 91 Am. St. 457, 66 Pac. 714; Vol. 7 Words & Phrases, pp. 6578, 6579; Black's Law Dictionary, p. 535, under title "General Law.")

In *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, the court had under consideration the question whether a certain law was general or special, and said:

"Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the state; it is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.' " (See, also, *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *People v. Wright*, 70 Ill. 388.)

In the case of *Paul v. Gloucester Co.*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86, the court had under consideration a local option law. The law was attacked on the ground that it was local or special in its application and the court held:

"The law is not in contravention of our constitutional provision that 'the legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties.' This inhibition in the constitution is not intended to secure uniformity in the exercise of delegated police powers. but to forbid the passing of a law vesting in one town or county a power of local government not granted to another."

The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law. It is applicable to every county in the state, and under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating

liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a "general law" within the meaning of that phrase as defined by the leading law-writers and the courts of last resort of the nation. The legislature has undertaken by this act to make a general law applicable to all of the counties in the state alike, as to whether the sale of intoxicating liquors shall be prohibited or not.

It is almost universally recognized that indulgence in intoxicating liquors leads to immorality, crime and pauperism, and that such liquors are in their nature dangerous to the morals, good order, health and safety of the people, and intoxicating liquors are not placed on the same footing with ordinary commodities. The business of selling such liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor, and it does not stand upon the same plane of utility and morality with the useful arts, trades and professions. (Joyce on Intoxicating Liquors, sec. 76.) It has been held by a long line of decisions from the United States supreme court down that there is no inherent right in a citizen of a state or of the United States to sell intoxicating liquor by retail. (*Id.*, sec. 77, and authorities there cited.) The right to engage in the retail liquor traffic is a mere privilege, and in defining the extent to which the privilege goes, the law should be strictly construed against the traffic. (*Id.*, sec. 77. See, also, Woollen & Thornton on the Law of Intoxicating Liquors, sec. 88 et seq.) Considering the view that is generally held in regard to the retail liquor business, by the adoption of the local option law the legislature intended to authorize the electors of each county to determine whether the sale of intoxicating liquors should be prohibited in the county. Sec. 7 of the local option law shows the intent of the legislature to make that law apply to all territory within a county, in special charter cities as well as cities incorporated under the general law. It provides, among other things, that "If a majority of the votes cast at such election shall be in favor of the proposition submitted (that is, to prohibit the sale

of intoxicating liquors in such county), it shall thereafter be unlawful for the board of county commissioners of the county to grant any person, firm, association, corporation or club a license to sell or dispose of intoxicating, spirituous, malt or fermented liquors or wines within said county." It is there declared that it shall be unlawful for a board of county commissioners to grant a license to sell or dispose of such liquors "within said county"—not within said county exclusive of special charter cities. Had the legislature intended to exclude special charter cities from the operation of said act, it would have been an easy matter to use clear and explicit language to that effect, but the phrase "within said county" has been used, which clearly means within every part and parcel of said county, and does not exclude special charter cities from the operation of said local option law.

In sec. 63 of the special charter of Lewiston, which section authorizes the council of that city to license, regulate and prohibit the sale of intoxicating beverages, it is also specified that its provisions do not empower the city of Lewiston to authorize anyone to do any act or engage in any business contrary to "the law of the land." What does the phrase "law of the land" mean as used in said section?

In the noted case of *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. ed. 629, which has received the sanction of the courts, Webster said: "By the law of the land is clearly intended the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means every citizen shall hold his life, liberty and property under the protection of the general rules which govern society." In many decisions it has been held that the "law of the land" and "due process of law" are synonymous phrases, and though verbally different, express the same thought and have the same meaning. In many of those decisions the phrase "due process of law" refers to procedure according to the law of the land, which process in each state is regulated by its own laws. "Due process of law" affords a hearing before it condemns and renders judgment only after trial. And it is often stated that "due process of law"

is that constitutional right which provides that no citizen shall be deprived of life, liberty or property except as provided by law. It was held in *Huber v. Riley*, 53 Pa. 112, and in *Kallock v. Superior Court*, 56 Cal. 229, that due process of law ordinarily implies and includes a complaint, a defendant, a judge, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceeding. The term "due process of law" relates primarily to the remedy or means of redress where rights are invaded, rather than to matters of substantive law. (*Board v. Collins*, 46 Neb. 411, 64 N. W. 1090.) The phrase "law of the land" in state constitutions imports a general public law equally binding upon every member of the community. (See authorities cited in vol. 3, Words & Phrases, p. 2232 et seq.)

In *Sheppard v. Johnson*, 21 Tenn. 285, the court held that whether a statute is the law of the land, within the meaning of that term as used in the bill of rights, depends upon two propositions: (1) That the legislature had the power to pass it; (2) That it is a general and public law equally binding upon every member of the community. The phrase "due process of law" in many decisions refers more particularly to the procedure prescribed by statute for the protection of life, liberty and property, and the method of enforcing rights or obtaining redress for their invasion, while the phrase "law of the land" includes the remedial law as well as substantive law; it includes that part of the law which the courts are established to administer, as opposed to the rules according to which the substantive law itself is administered. The substantive law is that part which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. (Black's Law Dictionary, under title "Substantive Law," p. 1132.)

The phrase "law of the land" as used in said sec. 63 of the charter of Lewiston means the law of the state, so far as the provisions of said section are concerned, and it prohibits the city of Lewiston from authorizing "anyone to do any act or engage in any business contrary to the law of the land"—the



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general law of the state. By the provisions of said section, the legislature has not abdicated the right to enact police regulations, to license, regulate, restrain and prohibit the sale of intoxicating liquors in said city. The city of Lewiston was not granted thereby the absolute power to regulate its own saloons without reference to the laws of the state. By the provisions of said sec. 63, the state has reserved to itself the ultimate right to control and govern the liquor traffic within the state. The city of Lewiston was given the right to regulate, restrain and prohibit it, but it was not given the right to violate the general police laws of the state by authorizing the sale of intoxicating liquors when such sales were prohibited by the general laws of the state. The legislature did not abdicate or delegate to the city of Lewiston its power of police regulation over intoxicating liquors. Sec. 63 authorized the city of Lewiston to license and regulate the sale of intoxicating liquors within the corporate limits of such city so long as licensing and regulating were not contrary to the general law of the state. So long as the state recognized the retail liquor business and licensed it, the provision of said charter would be operative, and the city might place additional restrictions and limitations upon the business within its corporate limits or might totally prohibit it; but when the general law prohibits it, there is nothing left in that business for the city to regulate.

We therefore conclude that said local option law is a general law of the state, and the legislature in adopting it established thereby a state policy in regard to the regulation of the traffic in intoxicating liquors, and since the majority of the electors in Nez Perce county have voted in favor of prohibiting the sale of such liquors as a beverage in said county, the county commissioners are prohibited from issuing a license to retail intoxicating liquors to any person within the corporate limits of the city of Lewiston or within said county. The judgment must therefore be affirmed, and it is so ordered. Costs awarded to respondent.

Ailshie, J., concurs.

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Argument for Respondent.

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(December 1, 1910.)

JOSEPH P. KEANE, Respondent, v. PITTSBURG LEAD  
MINING CO., a Corporation, Appellant.

[112 Pac. 214.]

## COSTS OF APPEAL—STENOGRAPHIC RECORD—COPY OF.

(Syllabus by the court.)

1. Under the provisions of sec. 3984, Rev. Codes, either party to a suit in which a stenographic record has been made may demand a typewritten copy of a part or the whole thereof, and the reporter must furnish the same upon the payment of a fee of seven and one-half cents per hundred words.

2. When a party procures a typewritten copy of the stenographic record to be used in the preparation of his bill of exceptions or statement of the case, and intends to have the cost thereof taxed as costs in the case on appeal, he must serve the copy of the stenographic record upon the adverse party when he serves his proposed bill or statement, so that the adverse party may have the benefit of it in preparing amendments or in ascertaining whether the proposed bill or statement is correct.

3. A transcript of such record in narrative form made by the reporter is not a compliance with said statute requiring the reporter to furnish a typewritten copy of the stenographic record, and the cost of procuring said record in narrative form will not be allowed as costs on appeal.

4. All fees earned by the reporter or his deputy under the provisions of the reporter statutes, which include section 3980 and the following seven sections, must be turned into the state treasury, and the reporter cannot evade that requirement by reducing the stenographic record to narrative form.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Appeal from an order taxing costs. *Reversed.*

A. G. Kerns, for Appellant.

Gray & Knight, and Wm. K. Shissler, for Respondent.

Counsel cite no authorities.

SULLIVAN, C. J.—This is an appeal from an order of the district court taxing against the appellant the following item of costs, to wit: "Official stenographer, transcript of testimony, \$120." It appears from the record that plaintiff's counsel requested the court reporter to make a transcript of the testimony taken on the trial, in narrative form, which he did, and charged \$120 therefor. In taxing the costs the court allowed said item as a part of the costs on appeal. That action of the court is assigned as error.

Under the provisions of sec. 3984, Rev. Codes, in any action in which a stenographic record has been taken, it is made the duty of the court reporter to furnish a copy of such record or a copy of any part thereof, to either party to the suit desiring the same, and he is authorized to charge a fee of seven and one-half cents per hundred words therefor, which must be paid in the first instance by the party requesting the copy, and the sum so paid may thereafter be taxed as costs in the case against the party finally defeated in the action. The copy contemplated by said statute is a literal copy of such record, containing the questions and answers, the objections made, the exceptions taken, etc., and such record reduced to narrative form by the stenographic reporter is not such a copy as the law contemplates.

Whenever an appellant is required to procure a transcript of the testimony taken on a trial by the reporter in order to prepare his transcript on appeal, he may procure the same to be made and use it in the preparation of his proposed bill of exceptions or statement, and when he serves his proposed bill or statement upon opposing counsel, he ought to furnish him such copy of the record, and when that is done, the one who paid for such copy, if he prevails on the appeal, may tax the cost of the same as a part of the costs on appeal. The law does not contemplate that each party must procure a transcript of the evidence in order to prepare his bill or statement or amendments thereto, but does contemplate that the appellant in the first instance shall procure such copy and the respondent may have the benefit thereof.

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The record shows that counsel for appellant requested the reporter to make a transcript of the evidence in narrative form and not a true copy thereof. Counsel might differ as to the correctness of the narrative form of the evidence as made by the reporter, and the respondent has a right to an exact copy of the record in order that he may decide whether the narrative form prepared is correct or not. And in cases where there is considerable evidence, opposing counsel might not be able to remember what the evidence was, and in order to reduce it to narrative form correctly he ought to have a copy of the evidence as given by the witnesses. For the reasons suggested, said stenographic record in narrative form does not come within the provisions of sec. 3984, and for that reason the court erred in taxing the cost thereof as a proper item of cost in said case.

Sec. 3988 provides that fees earned by any court reporter or his deputy, under the provisions of the court reporter act, which includes secs. 3980 to 3988, must be paid to the state treasurer to be placed to the credit of the general fund of the state, and requires such reporter to make a quarterly report to the state auditor of all fees earned by himself and deputies, and that such report shall be accompanied by a remittance of such fees, and whatever fees the court reporter or his deputy receives under the provisions of said statute, whether in making an exact copy of his notes or in reducing the same to narrative form on the demand of litigants, must be turned into the state treasury.

The order of the court taxing said item of \$120 as a part of the costs is reversed and the cause remanded, with instructions to the trial court to strike said item of \$120 from said cost bill. Costs of this appeal are awarded to the appellant.

Ailshie, J., concurs.

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Points Decided.

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(December 1, 1910.)

**JAMES B. McGRANE, Appellant, v. COUNTY OF NEZ PERCE, Respondent.**

[112 Pac. 000.]

**ELECTION CONTEST—LOCAL OPTION ELECTION—FORM OF BALLOT—NUMBERING BALLOT—SECRECY OF BALLOT—DISTINGUISHING MARKS ON BALLOT—LEGALITY OF ELECTION.**

(Syllabus by the court.)

1. Sec. 1, art. 6, of the constitution provides that, "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect."

2. Under the provisions of sec. 1, art. 6, of the state constitution, it would not be within the power of the legislature to authorize and direct the numbering of ballots to be used at an election.

3. Under the provisions of sec. 408, Rev. Codes, "No ballot must be used or counted at any election except the legal ballot printed by the county auditor . . . and distributed according to law by the distributing clerk within the polling-place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof, whereby it might be distinguished from any other ballot legally used on the same day."

4. Where an auditor of a county furnished ballots to the election officers of the several precincts of his county, and the ballots so furnished had been numbered consecutively from 1 to 15,000, and the number contained on each ballot corresponded with the number on the stub to that ballot, and the error, mistake, or wrongful act in numbering the ballots was not known to the electors, and the same was done without their knowledge or consent, and no opportunity was presented to the electors for having the error corrected, and the election was held by using such ballots in the several precincts of the county, the election will not be held void, either upon the ground that the numbering was an invasion of the constitutional secrecy of the ballot guaranteed to the people, nor upon the ground that the ballots contained distinguishing marks.

5. The prohibition contained in sec. 408, Rev. Codes, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties, but the statute nowhere prescribes that the penalty for vio-

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**Argument for Appellant.**

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lating this duty or a failure to faithfully discharge it shall be visited upon the electors or avoid the election.

6. To hold that the numbering of ballots by the election officers, who are charged with the preparation and distribution of election supplies and ballots, has the effect of rendering an election void, would place it within the power of the officers to disfranchise the entire electorate of their county, and prevent the holding of a valid and legal election, and would turn this statute safeguarding the elective franchise into an instrument of injustice and disfranchisement.

7. The purpose of the constitutional guaranty of "an absolutely secret ballot" and the statutory provisions against "distinguishing" marks on ballots is not so much to prevent marks and characters on ballots whereby it would be possible to distinguish the ballot of a particular elector, as it is the aim to prevent fraud, corruption, intimidation and oppression in elections and to so guard and hedge about the individual elector that he may vote his individual, conscientious and deliberate judgment without fear of anyone calling him to account therefor, and to prevent the corrupt voter from selling his vote and furnishing to the purchaser satisfactory visual evidence of the casting of the vote in accordance with the contract.

**APPEAL** from the District Court of the Second Judicial District, in and for Nez Perce County. Hon. Edgar C. Steele, Judge.

Action by plaintiff to contest a local option election held in Nez Perce county. Judgment for the defendant and plaintiff appealed. *Affirmed.*

**Chas. L. McDonald, and Eugene A. Cox, for Appellant.**

"All provisions of the general election laws of the state of Idaho not in conflict with the terms of the local option statute are applicable to all elections held thereunder." (*Gillesby v. County Commissioners*, 17 Ida. 586, 107 Pac. 71.)

The above citation settled two important propositions relative to elections in this state. In the first place, the constitution has guaranteed, and the legislature, to make such guaranty effective, has enacted laws that give to every elector in the state the assurance that when he approaches the polls to declare his choice for men or measures, he does so knowing the action he takes cannot, and will not, ever be

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Argument for Appellant.

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disclosed, and that the absolute secrecy guaranteed relieves him from preceding intimidation or subsequent persecution.

Secondly, the idea of secrecy of the ballot is so essential to the purity of elections and their freedom from bribery, corruption and frauds, that not even the elector himself has a right to disregard it, and if he desires his vote counted, he must so prepare it that his choice cannot at the time of balloting nor subsequently be identified. (Wigmore's Australian Ballot System, 2d ed., pp. 50, 53.)

Numbering the ballots destroys their secrecy. (*Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; Cooley's Const. Lim., 5th ed., 762; McCrary, Elections, sec. 453; Paine, Elections, sec. 535; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97.)

Statutes providing for a secret ballot are mandatory, and their terms must be complied with. (McCrary on Elections, sec. 226; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350; *Fields v. Osborne*, 60 Conn. 544, 21 Atl. 1070, 12 L. R. A. 551; *Slaymaker v. Phillips*, 5 Wyo. 453, 42 Pac. 1049, 47 L. R. A. 842; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Atty. Gen. v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Ex parte Riggs*, 52 S. C. 298, 29 S. E. 645; *Clarke v. Hardison*, 40 Tex. Civ. App. 611, 90 S. W. 342; *Brigance v. Harlock*, 41 Tex. Civ. App. 277, 97 S. W. 1060; *Talcott v. Philbrick*, 59 Conn. 472, 20 Atl. 436, 10 L. R. A. 150.)

In construing a statute of this character the court must take into consideration what its purpose is, the aim it seeks to accomplish, and generally all the other statutes germane to, and bearing on, the subject. (*Taylor v. Bleakley* (Kan.), 49 Am. St. 233, note p. 243; 15 Cyc. 357, note p. 98.)

While it does not appear in the complaint affirmatively that the large number who refrained from voting at this election would have done so had there been a secret ballot, yet in view of the fact that no secret ballot could be had and this number did not vote, the court could not tell that they did not refrain from voting for this reason. (*Guernsey v. McHaley*, 52 Or. 555, 98 Pac. 158; *State ex rel. Birchmore*

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Argument for Respondent.

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*v. Board of Canvassers*, 78 S. C. 461, 59 S. E. 145, 14 L. R. A., N. S., 850, 13 Ann. Cas. 1133.)

Mandatory provisions of the statute violated by election officers render ballot illegal, notwithstanding elector not at fault. (*Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837; *Caldwell v. McElwain*, 184 Ill. 552, 56 N. E. 1012; *Orr v. Bailey*, 59 Neb. 128, 80 N. E. 495; *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313; *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805; *Conaty v. Gardner*, 75 Conn. 48, 52 Atl. 416; *Griffin v. Tucker* (Tex. Civ. App.), 119 S. W. 338; *Newhouse v. Alexander* (Okl.), 110 Pac. 1121.)

D. C. McDougall, Atty. Gen., O. M. Van Duyn, J. H. Peterson, and D. E. Hodge, for Respondent.

An examination of the complaint herein shows that there is no allegation whatsoever of any malconduct, fraud or corruption of any of the parties named in subd. 1, sec. 5026, Rev. Codes. In fact, there is no allegation of any malconduct upon the part of any person. So this contest cannot be brought under said subdivision of said section. (*Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200; *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101.)

Even if contestant may contest upon the ground that certain parties were deterred and intimidated from voting, it would be necessary to allege and prove who the parties were and that they would have voted "wet" or differently from the declared result. (15 Cyc. 405, 406; *Cole v. McClendon*, 109 Ga. 183, 34 S. E. 384; *Lowrey v. Cheatham*, 131 Ga. 320, 62 S. E. 226.)

All acts violating the secrecy of the ballot do not invalidate the election. Acts for which the voter is not responsible do not affect the election, even though the secrecy of the ballot might be violated. (*Farnham v. Boland*, *supra*; *Freshour v. Howard*, *supra*; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. 315, 61 N. E. 405; *Peabody v. Burch*, 75 Kan. 543, 89 Pac. 1016, 12 Ann. Cas. 719; *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; *Lindstrom v. Bd. of Commrs.*, 94 Mich. 467, 54 N. W. 280, 19 L. R. A. 171.)



## Opinion of the Court—Ailshie, J.

"If identifying marks are placed on a ballot without the knowledge or consent of the voter, it does not render the ballot void, nor prevent it from being counted; but if it is done by the voter in preparing his ballot, it is a violation of law, and the ballot should not be counted." (*Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. 317, 59 N. W. 57; *People v. Board of Supervisors*, 135 N. Y. 522, 32 N. E. 242; *State v. Sadler*, 25 Nev. 131, 83 Am. St. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; *State v. Gay*, 59 Minn. 6, 50 Am. St. 389, 60 N. W. 676; *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708; *Atty. Gen. v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565; *Winn v. Blackman*, 229 Ill. 198, 120 Am. St. 237, 82 N. E. 215; *In re Town of Groton*, 118 N. Y. Supp. 417, 63 Misc. 370; *People v. Wood*, 148 N. Y. 142, 42 N. E. 536; *Baker v. Scott*, 4 Ida. 596, 43 Pac. 76; *State v. Fransham*, 19 Mont. 273, 48 Pac. 1.)

AILSHIE, J.—On the 15th of January, 1909. the commissioners of Nez Perce county made and entered an order calling an election in the county of Nez Perce to determine whether or not intoxicating liquors should be sold as a beverage in that county. The election was called to be held on the 9th day of March following. Ballots printed under the direction of the county auditor and by him distributed to the election officers of the several precincts of the county were in the following form:

No 3403

Nez Perce County Local Option  
Election, March 9th, 1910

No 3403

## LOCAL OPTION ELECTION

"Shall the sale or disposal of intoxicating liquors as a beverage be prohibited in the County of Nez Perce, Idaho?"

YES

NO

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This ballot complied with the requirements of law with the exception that it should not have been numbered. The statute, sec. 405, Rev. Codes, provides for numbering the stub but does not authorize the numbering of the ballot. According to the complaint, the fact that the ballots had been numbered was not discovered by the electors generally or by anyone except the auditor and printer, and possibly some of the election officers, prior to the opening of the polls on election day. The election was held and resulted in 3,444 votes being cast in favor of the proposition submitted and 2,612 votes against it. The record shows that 10,388 qualified electors were registered and were entitled to vote at this election, and that the total number of votes cast was 6,050.

It is alleged that this ballot did not afford the plaintiff and the electors generally of Nez Perce county the right of a secret ballot, and that it was in violation of sec. 1, art. 6, of the state constitution, which provides: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect." It is also alleged that since these ballots were numbered consecutively from one to somewhere in excess of 15,000 and were distributed in consecutive order, it was possible for the election officers and others to identify the ballot cast by any elector, and thereby destroyed the secrecy of the ballot guaranteed to the elector by the constitution. It is also alleged that this means of identification resulted in intimidating some voters so that they refused to vote at all, while others were not able to vote their deliberate convictions for fear of their ballots being identified and thereby exposing them to censure and obloquy from those who voted differently or who were advocating the opposite side of the question. It is further alleged that these numbers constituted identifying and distinguishing marks on the ballots in violation of the statute, sec. 408, Rev. Codes.

The defendant demurred to the complaint, and the demurrer was sustained and judgment was thereupon entered

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against the plaintiff, from which this appeal has been prosecuted.

Now, in the first place, the constitution of this state, sec. 1, art. 6, *supra*, guarantees to the electors "an absolutely secret ballot," and counsel argue that the legislature could not constitutionally enact an election law which would provide for and authorize the numbering of ballots, and that if the legislature could not authorize such a ballot it must necessarily follow that election officers, exercising the political power of the state, cannot furnish the electors with such ballots, and thereby deprive them of the absolute secrecy of their ballots. This proposition requires a brief analysis to detect whether it be sound or faulty. In the outset, it is perfectly safe to say that the legislature would have no authority under this constitutional guaranty to require the numbering of the ballots. The authorities to that effect are quite uniform. (*Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 679; *Williams v. Stein*, 38 Ind. 89, 60 Am. Rep. 97; *Smith v. Pease*, 27 N. Y. 45; Paine on Elections, chap. 453; McCreary on Elections, secs. 194, 195, 400 and 413.) Now that it must be conceded that the legislature could not, in the exercise of its constitutional power, direct the numbering of ballots, the final and decisive question recurs: Is an election valid where the ballots have been numbered without the knowledge or consent of the electors and the electors themselves are innocent and free from fault?

The local option statute (sec. 10) makes the general election laws applicable to the printing of tickets and furnishing supplies in connection with holding an election. (See *Gillesby v. Board of Commrs.*, 17 Ida. 586, 107 Pac. 71.) Sec. 408 of the Rev. Codes provides that, "No ballot must be used or counted at any election except the legal ballot printed by the county auditor . . . and distributed according to law by the distributing clerk within the polling place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof whereby it

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might be distinguished from any other ballot legally used on the same day . . . no elector shall be permitted to vote any other ballot than the one he received from the distributing clerk." It is alleged and conceded that these ballots were furnished by the county auditor and were the only ballots furnished for this election. All the ballots used throughout the county were open to the same objection, namely, that they were numbered. No two ballots contained the same number, but the numbering was consecutive from 1 to 15,000, and the ballots were furnished to the different precincts in books of 100 each. The ballot in each instance contained the same number contained on the stub from which that ballot was taken. Again, it must be conceded that under the provisions of this statute, sec. 408, the auditor was forbidden to furnish ballots that were numbered, and likewise the election officers were forbidden to distribute to the electors ballots that contained distinguishing marks. These numbers were not on the back of the ballots. There was in fact no distinguishing mark on the back of the ballot; the numbering was on the face of each ballot.

The question of numbered ballots has frequently been before the courts of states where a secret ballot is guaranteed, and so we turn to the decisions for light on this question. In *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, the supreme court of California had under consideration the question as to whether a ballot should be counted where the numbered stub had been left attached to the ballot, thus furnishing the same facilities for identifying the ballots as were furnished in this case. The court said:

"We hold that these ballots were properly counted, and likewise those were properly counted which the officers of election placed in the ballot-box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or malconduct upon the part of those officers may render them liable to severe penalties, but that is all. The law as to identifying marks refers to marks

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made by the voter, and it is only marks made by him that demand the rejection of the ballot. After citing many cases to the point, this court said in *People v. Prewett*, 124 Cal. 13, 56 Pac. 621: 'The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it shall appear that a fair election and an honest count were thereby prevented.' "

The same question again arose in California in the case of *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101, and the court quoted with approval from *Farnham v. Boland*, and also from *People v. Prewett*, 124 Cal. 13, 56 Pac. 621, and said: "The failure or neglect through ignorance or carelessness on the part of the precinct election officers, to remove the number of the ballot, did not have the effect to make the ballot illegal on the ground of a distinguishing mark placed thereon by the voter."

As late as 1909 the question of numbered ballots came before the supreme court of New York in *Re Town of Groton*, 63 Misc. 370, 118 N. Y. Supp. 417, over an election wherein the ballots were numbered on the back. The court in disposing of the matter said:

"These ballots were all alike in the respect complained of, those cast for and those against the propositions. The election officers counted them all, determined that they were valid, no one raising an objection or suggestion to the contrary. The ballots plainly disclosed to each voter this defect, and every voter could plainly see the error in the printing of the ballot; but it does not appear that anyone made objection. Quite possibly the voters favoring license, or the advocates and leaders of that side of the question, thought the defect would tend to their advantage; and perhaps it did. At any rate, they did not protest to the election officers, either before or at the canvass of the votes. They waited until the votes were cast and all counted and allowed, and until the result was declared and the official certificate thereof made and filed, showing a majority for 'no license,' and that the petitioner and those favoring license were defeated.

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Then they made their protest and complaint. Manifestly their protest should not be allowed unless the law requires it. Section 88 of the election law (Laws 1896, p. 947, c. 909) provides for the correction of the ballots when the error is timely brought to the attention of the officer charged with the duty of preparing them. It cannot be the purpose of the law to afford an opportunity for those interested in the result to proceed to a vote and count, without objection or protest, and then, when the result is adverse to their wishes, to give them another chance upon a palpable error which could have been corrected had they called attention to it; but, aside from the absurdity of such a holding, the principles enunciated in *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, 42 N. E. 536, are applicable to this proceeding and sufficient to require a denial of this application. It is there said (page 146 of 148 N. Y., page 537 of 42 N. E.): 'We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the wilful misconduct of election officers in performing the duty cast upon them.' "

In *Winn v. Blackman*, 229 Ill. 198, 120 Am. St. 237, 82 N. E. 215, decided in 1907, the supreme court of Illinois was called upon to determine what constituted distinguishing marks as the same were contained on ballots used at a general election. In the course of a somewhat extended and interesting discussion of the matter, the court said: "The distinguishing mark prohibited by law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of a mark put upon the ballot to indicate who cast it and to furnish the means of evading the law as to secrecy. . . . In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others."

In *McClelland v. Erwin*, 16 Okl. 612, 86 Pac. 287, the supreme court of Oklahoma, in considering what constituted a distinguishing mark made on a ballot, said:

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“We think that, to constitute a distinguishing mark, the mark, whether made by the use of a letter, figure, or character, should be such a mark as shows an intention on the part of the voter to identify or distinguish his particular ballot from others of this class, and any marks inadvertently made on a ballot, or made through carelessness or ignorance, which does not show upon the face of the ballot that such mark was made with the intention of distinguishing that ballot from others of the same class, or that that result would be accomplished by the mark, should not be treated as a distinguishing mark. Human experience teaches us that it is often very difficult to preserve absolute cleanness and neatness of the ballot; that in marking the various names on the ballot with the device provided by the election officers, a man will through inadvertence or carelessness place a stamp where it is not intended to be, and on discovering the error will immediately correct it, and at the same time this inadvertent or careless marking will not be done with the intention of identifying this particular ballot, nor will such be the result, nor do we think that the law should be so strictly construed as to render, in the absence of fraud, such a ballot illegal.”

The same court as late as 1908 in *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, quoted and approved the foregoing language from the McClelland case, and in course of the opinion added the following observation: “A voter ought not to be disfranchised and his ballot rejected where, as in this case, an election official improperly marks or numbers it, when it is not shown when it was done or that it was done with the connivance, consent, or knowledge of the voter, and for the purpose of distinguishing it.”

Connecticut was one of the first states of the Union to adopt what is popularly known as the Australian ballot system, and in view of that fact it is worth while observing that in the case of *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. 301, 43 Atl. 854, the court in considering distinguishing marks affecting the secrecy of the ballot, said: “Marks upon the face of ballots, which appear or are shown to have been made accidentally and not for the purpose of indicating the

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voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith either appears upon the face of the ballot or is shown by proof do not render the ballots void." And to the same effect was the holding of the supreme court of Nebraska in *State v. Russel*, 34 Neb. 116, 33 Am. St. 625, 51 N. W. 465, 15 L. R. A. 740, wherein it was said: "It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to, and not distinguishable from, others of a designated class."

In *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116, the supreme court of Minnesota says: "In the eighth precinct of the ward, ninety-three ballots were cast and counted for the appellant, and forty-two for the respondent, which had been numbered without the knowledge of the electors casting them, by the judges of election, by reason of a misunderstanding of the law on their part. These ballots were properly counted for the respective parties. To hold otherwise would place it in the power of the election officers to disfranchise electors at their pleasure." (See *Parker v. Hughes*, 64 Kan. 216, 91 Am. St. 216, 67 Pac. 637, 56 L. R. A. 275; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. 15, 61 N. E. 405; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; *People v. Wood*, 148 N. Y. App. 142, 42 N. E. 536; *Peabody v. Burch*, 75 Kan. 543, 89 Pac. 1016, 12 Ann. Cas. 719.)

Authorities might be multiplied to the foregoing effect, and it will be noted from an examination of them that while they all hold that numbering or other distinguishing marks on a ballot is contrary to both the letter and spirit of the law guaranteeing a secret ballot, nevertheless this alone will not justify the rejection of the ballot upon the canvass of votes, unless it appears that the numbers were placed there, either by the voter for the purpose of designating and distinguishing his vote, or by someone else with his knowledge and consent



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and with the intention of accomplishing such purpose. While our statute, sec. 408, *supra*, prohibits the election officers furnishing or distributing ballots containing such distinguishing marks, they have nevertheless done that very thing in connection with holding the election now under contest. It is not difficult to say in advance of their action what they *should have done* and *should not have done*. The law is clear, and it was the unmistakable duty of the officers to follow its mandates, but we are now confronted with a condition and not a theory. They have acted, and the election has been held. The electors have cast their votes. The electors have already been subjected to the predicament of casting their votes under circumstances which at least rendered it possible for the secrecy of their ballots to be invaded. This was done solely by and through either the negligence or wrongful act of the printer or officers charged with the preparation and furnishing of the ballots. The law does not say that an election shall be void under such circumstances. It does not speak of the condition after it has arisen, but contains directions and commands to the officers as to how they shall act, and these directions and commands are given in advance of the election. After all these things have occurred, the question arises as to whether the court shall visit the results and penalties of the negligence or wrongdoing of the election officers upon the innocent electors and declare their votes illegal and the election void, and thereby rob the people of their right of suffrage until the time arrives for another election. The question is simply reduced to this: Shall the electors be visited with two invasions of their rights instead of one? Shall they be deprived of the right of suffrage for the time being because their officers have acted negligently or wrongfully in the preparation of ballots, or shall the election be sustained and the penalties, if any, be visited upon the parties responsible for the errors or wrongs which have been committed? The same rule that will apply to numbered ballots in this election will necessarily apply in a general election. Now, if a general election is to be held void on account of such an error on the part of the election officers which extended throughout the

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county and into every precinct thereof, we would have the anomalous condition of the officers of a county who might not have succeeded in being renominated for their respective offices, or who feared they might not be re-elected, furnishing the electors with numbered ballots so as to avoid the entire election, and thereby enable the officers to hold over for two years in the very offices for which the election is being held to elect their successors. This would be allowing the officers to profit by their own mistake or wrong and placing a double penalty upon the people. Under the laws of this state, a general election can only be held biennially, and so if it is not held on the day fixed by law, there will be no other general election for two years thereafter, and in the meanwhile the old officers will hold until their successors are elected and qualified. (Rev. Codes, sec. 32a.)

While we are obliged to condemn in unqualified terms the ballots used in this election and hold that they were not in conformity with law in that they were numbered, we also hold that the electors of Nez Perce county were not chargeable with this error or mistake, and that the wrong of the officers cannot be visited upon the electors so as to deprive them of the right of suffrage where the electors themselves have not been parties to the wrong. Two *wrongs* will no more make a *right* in law and government than in morals. To follow up the wrongful preparation of ballots with setting aside the election would only be adding another injury to an already outraged electorate.

Attention is also called to the provisions of sec. 407 of the Rev. Codes, which provides as follows: "Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or descriptions of the candidates nominated for office, or in the printing of the tickets, the probate court of the county may, upon application of any elector, by order, require the county auditor or municipal clerk to correct such error, or to show cause why such error should not be corrected." This section provides for the correction of just such errors as occurred in this case on application to the probate judge of the county. Of course, accord-

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ing to the allegations of the complaint, the electors did not discover the error until the polls had opened, and of course the provisions of this section would not have been available to accomplish any real results at this present election. It does show, however, that the purpose of the lawmakers was to provide for correcting such errors and mistakes as this that might occur in the preparation of ballots.

At this point it is well to observe that no contention is made that the secrecy of the ballot of any elector was actually invaded, or that the vote of any person has been in fact identified or disclosed. The whole complaint made is that it was rendered possible, and not that the thing was actually accomplished, nor is it contended that it was done with a *purpose* of invading the secrecy of the ballot or that the printer who printed the ballots or the officers who furnished them did so *wrongfully, intentionally or criminally*, or that it was anything other than a negligent act or mistake. While the constitution guarantees "an absolutely secret ballot," it is nevertheless true that "absolute" secrecy is practically impossible under the prevailing method of printed ballots which are delivered to the elector and which he is permitted to handle and on which he may mark his choice with a pencil. The law tells him just where and how he shall mark his choice of candidates, and the statute of this state also directs that there shall be a blank column printed on the ballot wherein the elector can write the names of any persons he desires for any particular offices, and it is also true that in many of the precincts of the several counties no nominations for precinct officers are usually made, and the electors are authorized to write upon the ballot in the proper place their choice for justices of the peace and constable. Now, it is quite clear that the handwriting of almost any elector may be identified, not only by the person himself, but by others who are acquainted and familiar with his handwriting. It is not only true that identification may be had through this means, but it may be made by the manner or method of marking the ballot, and yet those marks may have been made in substantial compliance with the statute. Again, the man fresh from the

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field, the forge, the carpenter-shop, or the mason's leave the imprint of his fingers on his ballot so that he but the election officers and bystanders may identify the ballot, and still this has been done unin and innocently, and without any purpose or intent distinguishing marks upon the ballot. The purpose of the law in pronouncing against distinguishing marks and in preserving secrecy was to guard against the corrupt voter delivering his vote to the vote purchaser, so that he cannot identify the article that he was selling to the voter. A man who will corrupt a voter will not trust the word of that voter as to whether he has delivered his vote according to contract. He will want some visual evidence of the performance of the contract before he parts with his money. These are some of the things the law intends to protect the people at large against, and at the same time it intends to guard the individual elector from intimidation and undue influence and greater temptation than he is able to stand. It leaves the voter so that he does not run the risk of losing a position, being thrown out of employment, or subjected to various annoyances on account of having voted in a given way or having failed to vote as he was expected to do. Under this method there is no way of knowing whether he will vote as he promises, and but little chance for extracting from him a promise at all.

We conclude that the judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, C. J., concurs.

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Argument for State.

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(December 3, 1910.)

STATE, Respondent, v. JOHN LOCKHART, Appellant.

[111 Pac. 853.]

CRIMINAL LAW—STATE AS PLAINTIFF—ADMISSION OF EVIDENCE.

(Syllabus by the court.)

1. Sec. 1 of art. 5 of the constitution, which authorizes prosecutions in the name of the people, is not violated by sec. 7353, Rev. Codes, which directs that criminal actions shall be prosecuted in the name of the "State of Idaho" as a party plaintiff, and a prosecution by "State of Idaho" as plaintiff is in conformity with the constitution and the statute.

2. In a prosecution for homicide, it was error for the court to permit the state to introduce in evidence a card showing the membership of the deceased in a particular organization of which a majority of the jurors were members, where the only reason for introducing the card was that it tended to establish the name of the deceased.

3. Where during the course of the prosecutor's statement to the jury before the introduction of evidence the defendant asks that the witnesses be excluded, it is proper and advisable that the order of exclusion be made and the witnesses be excluded prior to the statement of the case by the prosecutor.

APPEAL from the District Court of the First Judicial District, in and for the County of Shoshone. Hon. W. W. Woods, Judge.

Prosecution for murder and defendant convicted of murder in the second degree. Defendant appeals. *Affirmed.*

Bixby & Marlowe, for Appellant, cite no authorities.

D. C. McDougall, Atty. General, O. M. Van Duyn, and J. H. Peterson, Assistants, for the State.

It is well-settled law, that if a defendant voluntarily submits to a preliminary examination, he may not thereafter question the sufficiency of the complaint. This would be true even though the complaint had been made on information

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and belief instead of being a direct statement. (12 Cyc. 294, and cases cited under note 63.)

AILSHIE, J.—This is another case where liquor, cards and a sixshooter have furnished a subject for the coroner and a victim for the penitentiary. Appellant was convicted of the crime of murder in the second degree and sentenced to a term in the state penitentiary of not less than ten years and extending to a maximum of a life term. The shooting appears to have been the outgrowth of cheating at cards in a poker game the night before the homicide.

This appeal does not involve the sufficiency of the evidence, but rather presents alleged errors of law committed in the course of the trial. The first question presented is the sufficiency of the complaint filed before the committing magistrate and on which the preliminary examination was held. We might dispose of this on the ground that the question was not properly raised, but, waiving that, have examined the complaint, and are satisfied of its sufficiency.

It is next urged by appellant that the court erred in not quashing and setting aside the information, for the reason that the action was prosecuted in the name of the "State of Idaho," plaintiff, against the defendant, instead of "The people of the State of Idaho." It is insisted that under sec. 1 of art. 5 of the constitution all prosecutions should be had in the name of "The people of the State of Idaho" against the party charged. The constitution recognizes that all criminal prosecutions shall be made by and on behalf of the people of the state, but it does not attempt to specify the particular words or phrase in which the people in their collective capacity shall have their prosecutions made. This section of the constitution is in harmony with sec. 2 of the Bill of Rights which declares, "that all political power is inherent in the people." The legislature has provided by sec. 7353, Rev. Codes, that "a criminal action is prosecuted in the name of the state of Idaho as a party against the person charged with the offense." The legislature has not sought to have prosecutions made by or on behalf of any other than the people,

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Opinion of the Court—Ailshie, J.

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but has merely designated the common name that shall be adopted by "the people" and used as party plaintiff in these prosecutions. In such a case the "State of Idaho" is the name adopted to represent the people in their collective capacity when prosecuting offenses against the laws of the people. It is the name under which "the people" are doing business. We fail to see any violation of the constitution in the prosecution of a person accused of crime where the prosecution is had in the name of "The State of Idaho," instead of in the name of the people of the state of Idaho.

After the jury had been impaneled and sworn to try the case, the prosecuting attorney made a statement to the jury of the facts the state expected to establish upon the trial of the case. In the midst of his statement, one of the attorneys for the defendant asked the trial court for an order excluding witnesses from the courtroom during the progress of the trial, except the witness being examined, and objected to the prosecutor making his statement of the facts he expected to prove in the presence of the witnesses, but insisted that the order be made and that the exclusion be had prior to the statement of the case to the jury. The trial judge declined to make the order until after the statement by the prosecutor was completed, whereupon the order was made. This action of the trial judge is assigned as error. While we think it would have been eminently proper to have excluded the witnesses prior to the statement by the prosecutor, we do not consider the action of the court an abuse of his discretion, and it certainly would not afford grounds for reversal.

In the progress of the trial some confusion arose as to the correct name of the deceased who was designated in the information as Sam Sharp. Some witnesses seem to have referred to him as Sam Sharp and others as Swan Sharp. The state in endeavoring to establish his true name produced a card which was found soon after the shooting among some papers in a cigar box in Sharp's bunk in a tent at the camp where he was working. This was a card of membership in the Butte Union of the Western Federation of Miners. After proving where the card was found, the state offered to intro-

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Opinion of the Court—Ailshie, J.

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duce the card and the defendant objected to its introduction. The court finally permitted the deceased's name as it appeared on the card to be read to the jury. In the course of the proceeding, however, it developed quite fully to the jury that this card was a card showing the deceased's membership in the Butte Union of the Western Federation of Miners. The defendant seems to have had no notice prior to this time that such a card existed or would be offered in evidence. His counsel had consequently made no examination of the jurors as to whether any of them were members of the Western Federation of Miners. Subsequent to the trial, however, they learned that seven of the jurors were members of the union, and that one of them was secretary of one of the local unions in the Coeur d'Alene district. They presented these facts by affidavits on motion for a new trial. It is now contended by the appellant that the admission of this card, or rather the name that appeared on the card, and consequently the fact that the deceased was a member of the Western Federation of Miners, was reversible error. It is quite apparent that this was done for the purpose of appealing personally to the members of the jury who were members of the miners' union. If it had been solely for the purpose of disclosing the name of the deceased, that could have been better done by letters which it is shown were found at the same time and place as this card and which appeared to have been addressed to him. These, however, were not used for that purpose. We have no doubt but that the ruling of the court in admitting this was erroneous. The card was not admissible for any purpose. The only question is whether it was such an error as requires a reversal of the judgment. For the purpose of determining that fact we have examined the record and evidence in the case quite carefully, and are satisfied that the crime has been committed and that the evidence was abundant to justify the verdict of conviction in this case. In the light of this condition of the case, and the further fact that it does not affirmatively appear that the jury or any member thereof was influenced by this incident, we do not think we would be justified in reversing the judgment on that ground.



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Points Decided.

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We have examined the other assignments and do not find any error requiring our further consideration. This is a case where both parties were at fault. After reading the evidence of witnesses somewhat carefully, we are strongly of the opinion that the defendant when he borrowed a gun and went to the place where Sharp was at work did not go with the intent of killing Sharp, but rather with the intent of scaring and intimidating Sharp into paying the sum of \$33, which the defendant claimed was due him on a gambling debt from the night preceding. When they met, the defendant being thus armed, the inevitable row occurred, and shots were fired to intimidate Sharp, and when Sharp fought back the result was that he was shot down by the appellant. Appellant now finds himself in the unfortunate position of having to pay the penalty.

The judgment should be affirmed, and it is so ordered.

Sullivan, C. J., concurs.

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(December 3, 1910.)

ISRAEL GAMBLIN, Respondent, v. M. M. DICKSON, Appellant.

[112 Pac. 213.]

CONVEYANCE OF REAL ESTATE—OBTAINED BY FRAUD—FINDING OF FACTS  
—SUFFICIENCY OF EVIDENCE—RESCISSION—TENDER.

(Syllabus by the court.)

1. Evidence held sufficient to support the finding of facts.
2. In an action for rescission of a contract, it is sufficient if the plaintiff makes offer to restore or to do equity in his complaint, as it is always within the power of the court to require that the person invoking equity shall do equity as a condition of relief, and the court may impose terms which may be just and equitable and may enforce compliance therewith.
3. The rule is different in an action at law based upon a rescission of the contract by one of the parties, and such distinction

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Argument for Respondent.

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arises out of the difference between the powers of the two courts—equity and law.

4. In the case at bar the plaintiff has not attempted to abrogate or rescind the contract of sale by his own act, but has by this action sought to have it rescinded by judicial proceedings.

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. Robt. N. Dunn, Judge.

Action to rescind a contract for the sale of real estate. Judgment for plaintiff. *Affirmed.*

Chas. L. Heitman, J. W. Merritt, and H. H. Taylor, for Appellant.

It is expressly alleged in the complaint that no tender or offer was made by respondent before the commencement of this action. Respondent did not offer nor attempt to return what he had received, or to put the parties *in statu quo*. The law is well settled that before a party is entitled to rescind a contract he must put, or offer to put, the other party *in statu quo* by full restoration of all he has received. The complaint, therefore, does not state a cause of action. (*Wood v. Nichols*, 6 Wash. 96, 32 Pac. 1055, 35 Pac. 140; *Bryant v. Stothart*, 46 La. Ann. 485, 15 So. 76; *Bird's Appeal*, 91 Pa. 68; *Reeves v. Corning*, 51 Fed. 774; *State v. Williams*, 39 Kan. 517, 18 Pac. 727; *Kelley v. Owens*, 120 Cal. 507, 47 Pac. 369, 52 Pac. 797; *Harkness v. Cleaves*, 113 Ia. 140, 84 N. W. 1033; *Herman v. Haffenegger*, 54 Cal. 161.)

B. S. Bennett, for Respondent.

It is not necessary where a party brings a suit to obtain a rescission of the contract that he should make a tender before the commencement of that suit, provided in his complaint he offers to make restoration of what he may have received, since the decree will require him to make restoration as a condition precedent to his having the relief. (24 Am. & Eng. Ency. of Law, 621, and notes.)

And where restoration has not been accomplished in fact, it is only required that the plaintiff shall make his offer to

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restore or do equity in his complaint. (*Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533; *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053; *Ludington v. Patton*, 111 Wis. 211, 86 N. W. 571; Fetter on Equity, p. 139; 6 Pomeroy's Eq. Jur., sec. 688; 6 Cyc. 313; *Martin v. Martin*, 35 Ala. 560; *Coffee v. Newsome*, 2 Ga. 442; *Wickiser v. Cook*, 85 Ill. 68; *McCorkell v. Karkhoff*, 90 Iowa, 545, 58 N. W. 913; *Thayer v. Knote*, 59 Kan. 181, 52 Pac. 433; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004; *Jandorf v. Potterson*, 90 Mich. 40, 51 N. W. 352; *Kiefer v. Rogers*, 19 Minn. 32; *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *Crocker v. Oakes*, 106 Fed. 760; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053; *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805; *Clark v. O'Toole*, 20 Okl. 319, 94 Pac. 547.)

SULLIVAN, C. J.—The respondent brought this suit for the purpose of having canceled and annulled a certain warranty deed conveying real estate in Bonner county to the appellant. It is alleged, among other things, in the complaint that the defendant through fraud and conspiracy procured the respondent to convey said land to him. The defendant answered and denied the material allegations of the complaint. The cause was tried by the court without a jury, finding of facts was made and judgment entered in favor of the respondent. A motion for a new trial was denied. This appeal is from the judgment and order denying a new trial.

It appears from the record that the respondent was the owner of seventy-eight acres of land bordering on Hayden Lake, Bonner county, and that the appellant desiring to purchase the same offered to trade the respondent for said land forty shares of stock in the Spokane and Big Bend Ry. Co., a corporation that had done certain things toward procuring a right of way for said road, but none of said road had been constructed. It appears that the stock was represented by the appellant to be of the value of \$100 per share, when in fact it had no market value.

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Opinion of the Court—Sullivan, C. J.

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Upon all of the evidence introduced on the trial, in which there is a conflict, the court found upon all of the issues in favor of the respondent, and found that said railroad company at the time said exchange was made had little tangible property, and its franchises, contracts and property were not sufficient to give more than a nominal value to its stock, and at the time of making said transfer in June, 1907, it was of little or no value, and that it was of little or no value at the time of making said finding of facts, to wit, on the 25th of September, 1909.

On a careful examination of the evidence, we find that it fully supports and sustains the findings made by the court.

Errors are assigned in regard to the admission of certain testimony; in denying a motion to strike out certain testimony; denying a motion for a nonsuit, and also in refusing to admit certain testimony offered by the defendant. We are fully satisfied from an examination of the entire record that it contains no reversible error and that the assignments of error are not well taken.

*In limine*, counsel for appellant contends that before a party is entitled to rescind a contract, he must put, or offer to put, the other party *in statu quo* by a full restoration of all he has received. The rule there stated is applicable in cases where a rescission is made before an action is brought, but it is not necessary where a suit for rescission is brought. The correct rule is stated in 24 Am. & Eng. Ency. of Law, p. 621. The author there says:

“Whether the complainant in a suit for rescission must, as a condition precedent to relief, have offered or tendered restitution to the defendant prior to the beginning of the suit, is a matter upon which the authorities are conflicting. The rule of the better considered cases is, that it is sufficient that the plaintiff makes his offer to restore or to do equity, in his bill or complaint, and shows therein that he has substantially preserved the *status quo* on his part so as to be able to fulfill his offer. This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equita-

## Opinion of the Court—Sullivan, C. J.

ble terms as a condition of relief, and that the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith. It is conceded that the rule is different in actions at law based upon a rescission by the act of the party, but the distinction taken is based upon the difference in the powers of the two courts."

In *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821, the court held that where a party seeks the aid of a court to rescind a contract, it is not necessary that he previously attempt a rescission or make any tender to the other party, except where such tender is necessary to put the other party in default.

In *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053, it was contended that a restoration or tender should have been made before the action could be brought, but the court held against that contention in the following language:

"Authorities in support of respondent's position on this point are abundant, but are foreign to the case, because she has not attempted to abrogate and rescind the mortgage contract by her own act, but by judicial proceedings instead. In such cases, where one seeks the aid of a court to set aside and rescind a contract, it is not essential that he should have previously attempted a rescission, or should have made any tender to the other party, except when such tender is necessary to put the other party in default. By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted. What such a plaintiff ought to do, and what he must do, to reinstate the other party *in statu quo*, as a condition for repudiation and rescission, is for the court, which always possesses the necessary power to determine the question."

The same rule is adhered to in *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805, and in *Ludington v. Patton*, 111 Wis. 211, 86 N. W. 571. In the latter case the court clearly draws the distinction between a suit for a rescission of a contract on the ground of fraud and an action at law to recover back that which has been paid upon a contract void for fraud. The

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latter contemplates a precedent rescission of the contract by act of the plaintiff, and an action in equity to rescind a contract invites and requires equity to effect that end, and looks to the decision in that action to accomplish it, and to impose such terms of rescission as may be deemed equitable under all of the facts in the case. The earlier decisions in California, Colorado and Washington and some other states would indicate that they were made without reference to the distinction above mentioned.

See, also, *Clark v. O'Toole*, 20 Okl. 319, 94 Pac. 547, where the rule here laid down is discussed at length and authorities cited.

The record shows that the respondent in the case at bar did offer to place the defendant *in statu quo*, not before the suit was brought, but afterward, and the decree entered required the plaintiff to pay to the defendant the sum of \$500, with interest thereon at the rate of seven per cent from the time said money was paid by the appellant, and to deliver to the appellant forty shares of the capital stock of said railway company, and upon the payment of that amount and the delivery of said shares, within thirty days after the entry of said judgment, defendant was required to reconvey said land to the respondent.

We find no reversible error in the record and the judgment is affirmed, with costs in favor of respondent.

Ailshie J., concurs.

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Points Decided.

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(May 9, 1910.)

ED. MALONEY, Respondent, v. WINSTON BROS. COMPANY, Appellant.

[111 Pac. 1080.]

INSTRUCTIONS—PERSONAL INJURY—HAZARDOUS UNDERTAKING—ASSUMPTION OF RISK—DUTY OF MASTER—DUTY TO MAKE PLACE OF WORK SAFE—PROOF OF NEGLIGENCE—SUFFICIENCY OF EVIDENCE—EXCESSIVE DAMAGES.

(Syllabus by the court.)

1. Instructions examined, considered and *held* not to be erroneous.
2. Where a laborer seeks and obtains employment at a hazardous and dangerous task and which must necessarily be prosecuted in a dangerous place, he thereby assumes the ordinary risks incident to the employment and attendant on the place where the work is prosecuted, but he does not thereby assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition, as a place of the kind should be maintained in which employees are to prosecute their work.
3. In the case of a hazardous work like driving a railroad tunnel through the mountain, an increased risk is assumed and an increased duty is imposed by law on both the master and servant proportionate to the dangers of the place and the risks of the employment—on the master to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant to either assume or avoid patent and obvious dangers and those necessarily incident to the work and the place in which the work is being prosecuted.
4. It is the established rule of law that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee or fellow-servant to whom the negligent act is traceable.
5. In an action for personal injuries received by and on account of the negligence of the master, negligence must be shown, and this may be done by positive testimony of the commission of a wrongful act by the master or the neglect by him to discharge a positive duty, or it may be shown by proof of the conditions of the place in which the master placed the servant or the attendant circumstances surrounding the occurrence and the happening of the thing which caused the injury.

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Argument for Appellant.

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6. Where the servant is under the immediate direction of a superior employee or a vice-principal and performs each task or duty at the time and in the manner directed by his superior, and the servant has no discretion in the matter of inspecting or making safe the place in which he is to work, he has a right to assume that the superior or vice-principal has examined and inspected the place in which he is set to work and has found it in a reasonably safe condition, and in such case the servant is only chargeable with the duty of taking notice of conditions as he sees them and those dangers that are patent and obvious.

7. Where the master is engaged in driving a railroad tunnel and has a large number of men engaged in drilling, blasting and shoveling away the rock and earth, it is the duty of the master to take reasonable precaution for the safety of the men, and to that end to have some person intrusted with the duty of examining and inspecting the place after shots have been fired, directing the manner and method of removing loose rock or earth from the walls and roof, and making the place reasonably safe for the men who are to work therein.

8. Where an injury has been received by the servant on account of the negligence of the master, damages should be computed and ascertained and awarded on the basis, as nearly as possible, of compensating the servant for the pain, suffering and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was before the injury was inflicted.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Action by the plaintiff for damages for personal injury. Judgment for plaintiff and defendant appealed. Judgment *modified* and *affirmed*.

Kerns & Ryan, for Appellant.

There is absolutely no evidence to show that anyone was negligent and that it was not one of those accidents incident to any business which cannot with reasonable prudence be foreseen. The plaintiff must make his case. He has failed to do so. (*Reino v. Montana Mineral Land Devel. Co.*, 38 Mont. 291, 99 Pac. 853; *Hardesty v. Largey Lumber Co.*, 34 Mont. 157, 86 Pac. 29; *Holt v. Spokane E. Co.*, 4 Ida. 443,



## Argument for Appellant.

40 Pac. 56; *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940.)

It is incumbent on him to show affirmatively all the elements of a right to recover, to prove all the facts which constitute or make apparent the alleged negligence of the master, and that it was the proximate cause of the injury. (*Labatt, Master and Servant*, sec. 832; *Hamelin v. Malster*, 57 Md. 287; *A. T. & S. R. Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411; *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 Am. St. 807, 39 Atl. 292, 39 L. R. A. 842; 20 Am. & Eng. Ency. of Law, 87, 88; *Kincaid v. O. S. L. Ry. Co.*, 22 Or. 35, 29 Pac. 3; *Alcorn v. Chicago Ry. Co.*, 108 Mo. 81, 18 S. W. 188; *Baltimore etc. Ry. Co. v. State*, 75 Md. 152, 32 Am. St. 372, 23 Atl. 310; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Minty v. U. P. R. Co.*, 2 Ida. 471, 21 Pac. 660, 4 L. R. A. 409; *Woelflen v. Lewiston-Clarkson*, 49 Wash. 405, 95 Pac. 493.)

Where the place that an employee is to work is a room in a mine, or tunnel, the place is provided in the progress of the work by the employees themselves. It is made secure or otherwise by the way in which they perform their respective duties. (*Waddell v. Simoson*, 112 Pa. 567, 4 Atl. 725; *Shaw v. Mining Co.*, 31 Mont. 138, 77 Pac. 515; *Cummings v. Reduction Co.*, 26 Mont. 434, 68 Pac. 852; *Axtell v. Northern Pac. Ry. Co.*, 9 Ida. 392, 74 Pac. 1075; *Zeinke v. N. P. Ry. Co.*, 8 Ida. 54, 66 Pac. 828.)

The master is not required to provide a safe place in cases in which the very work upon which the servant is engaged is of a nature to make the place where it is done temporarily insecure, but in such cases the servant assumes the increased hazard. (*Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *McDonald v. Buckley*, 109 Fed. 290, 48 C. C. A. 372; *Davis v. Trade Dollar Cons. Min. Co.*, 117 Fed. 122, 54 C. C. A. 636; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Russell Creek Coal Co. v. Wills*, 96 Va. 416, 31 S. E. 614; *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463, 58 Am.

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Argument for Respondent.

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St. 505, 64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435; *Floyd v. Sugden*, 134 Mass. 563.)

"The foreman of a gang of laborers employed by a contractor is a fellow-servant of one of the gang." (*Anderson v. Winston*, 31 Fed. 528; *McDonald v. Buckley*, 109 Fed. 290, 48 C. C. A. 372; *Armour v. Hahn*, 111 U. S. 318, 4 Sup. Ct. 433, 28 L. ed. 440; *Chicago & Ohio Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Beesley v. F. W. Wheeler Co.*, 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; *Alaska Treadwell M. Co. v. Wheelan*, 168 U. S. 36, 18 Sup. Ct. 40, 42 L. ed. 390; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 773; *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. ed. 612.)

Gray & Knight, and John H. Wourms, for Respondent.

It is the absolute duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work, and the conditions under which it must necessarily be performed. (*Bunker Hill & Sullivan M. & C. Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363; *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433; *Western Coal Min. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 773; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. ed. 464; *Rowden v. Schoenherr-Walton M. Co.*, 136 Mo. App. 376, 117 S. W. 695; *Cinkovitch v. Thistle Coal Co.* (Iowa), 121 N. W. 1036; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 15 Morr. Min. Rep. 535, 11 Pac. 612; *Ross v. Shanley*, 185 Ill. 390, 56 N. E. 1105.)

The master is liable for the negligence of an employee who represents him in the discharge of his personal duties to his servants, and beyond that he is liable only for his own personal negligence. (*Larsen v. Le Doux*, 11 Ida. 49, 81 Pac. 600; McKinney on Fellow-servants, sec. 23; *Bunker Hill & Sullivan Min. & Con. Co. v. Jones*, *supra*; *Hough v. Texas & Pac. Ry. Co.*, 100 U. S. 213, 25 L. ed. 612; *Ford v. B. Co.*, 110 Mass. 240, 14 Am. Rep. 598.)

## Opinion of the Court—Ailshie, J.

The facts in this case show that there was nothing to indicate to the plaintiff from such inspection as he could or was permitted under the rules and practice of the tunnel to make that he was assuming any such danger as the accident showed existed. (*Texas & Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; *Choctaw & R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. ed. 96; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. ed. 766; *Texas & Pac. Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. ed. 905; *Texas & Pac. R. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382; *Choctaw etc. Co. v. Holloway*, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. ed. 207; *Chicago, Great Western R. Co. v. McDonough*, 161 Fed. 657; *Harvey v. Texas & Pac. Ry. Co.*, 166 Fed. 385; *Central Coal & Coke Co. v. Williams*, 173 Fed. 337; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060.)

A miner does not assume the risk of the caving in of the roof of a mine. (*Bunker Hill etc. Co. v. Schmelling*, 79 Fed. 263, 24 C. C. A. 564.)

"A new trial will not be granted on account of the absence of witnesses where it is apparent that the witnesses were known at the time of the trial but could not be found, and no continuance is applied for on that ground." (*State v. Cook*, 13 Ida. 45, 88 Pac. 240.)

AILSHIE, J.—This action was prosecuted for the recovery of damages for personal injuries received by the plaintiff while working in what is known as the St. Paul pass tunnel, which was being cut through the Bitter Root mountains for the use of the Chicago, Milwaukee & St. Paul Ry. Co. The east end of this tunnel starts a short distance from the town of Taft, in Montana, while the west end of the tunnel is in Idaho. The plaintiff recovered judgment for \$15,000 and defendant moved for a new trial and its motion was denied, and it has appealed from the judgment and order denying the motion.

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Opinion of the Court—Ailshie, J.

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This tunnel was about twenty-four feet wide by thirty feet high. The work was being prosecuted by four gangs of men, who were engaged in various classes of work and each gang was under a separate shift boss. Two gangs of men worked at a time. The work was prosecuted in two sections. The upper half of the tunnel, known as "the heading," was driven by one gang of men, and a couple of hundred feet back of this work another gang was engaged in working on what is known as "the bench," this work consisting in excavating the lower half of the tunnel.

The respondent was employed as a machineman in operating an air drill and was working on the heading. Six drills were used at a time across the face of the tunnel. Each drill had two men, a machineman and a helper. After the holes were drilled they were loaded and fired. It was the custom that after the blasts were fired the shift boss would precede the gang of men to see that the smoke had sufficiently cleared away to begin work, and he was followed by the men. It appears to have been the duty of the shift boss to "sound" the overhanging rocks and inspect the place, and see if it was necessary to "bar down" any loose rock or earth before the men began to work. It was then his custom to call the men and set them to work, telling each one where to work and what to do. Respondent had been in the employ of appellant about eighteen days prior to his injury. The timbering for the heading or upper tunnel work was of a temporary character, and was ordinarily extended as near up to the face of the tunnel as possible in order to prevent rock and earth falling from above and injuring the men. The timbering overhead was up to within about six or eight feet of the face of the heading at the time of this accident.

The accident occurred in the heading on the morning of June 21, 1908. The plaintiff went on duty at 6:30 A. M. Blasts had been fired some time previous to this, and the loose rock and earth called "muck" had to be shoveled back before the men could set their machines. When respondent went on duty the shift boss told him to shovel back the rock so that he could set his machine. The work appears to have

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been progressing in the greatest of haste, and the men worked in fifteen minute relays. One gang would shovel fifteen minutes and thereupon the other gang would take their place and shovel for a like period. Respondent was shoveling on a second relay when from a half-ton to a ton of rock fell and caught his left leg, crushing the ankle, breaking the fibula about one inch and three-quarters above the ankle joint, thereby inflicting what is designated as a "Pott's Fracture." The respondent was taken to the hospital, where he remained for three months and three days, and thereafter returned to his work, and after an attempt lasting through three days to continue his work, found that he was unable to do so, suffered great pain and was obliged to quit. It appears that the injury is permanent. The fracture caused an eversion or turning out of the foot, resulting in shortening the left leg; and the evidence discloses that it will prevent him from doing a great deal of walking.

A great many errors are assigned, and we will endeavor to deal with them in groups rather than singly. The first seven are directed at the admission and rejection of evidence. There was no error in these rulings of the court. The next group of assigned errors have reference to the giving and refusing instructions. There was no substantial error committed in these respects. Instruction No. 5 given by the court is particularly objected to on account of the following language which it contained: "It is sufficient to say, however, that the law does not under any circumstances exact from the servant the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond this he has the right to assume without inquiry or investigation that his employer has discharged his duty of furnishing him with a reasonably safe place in which to perform his duties." This part of the instruction is too broad, in that it tells the jury, "that the law does not under any circumstances exact from the servant the use of diligence in ascertaining such defects." This is not the law in all cases of damages. It is, however, the law under the facts of this case, and there was consequently no error in the court so

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instructing the jury. It should also be remembered that this instruction opened with the statement, "that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazard incident to the situation." From this it will be observed that the court told the jury that the employee assumed the usual and ordinary risks of a hazardous employment when he entered on this work. This instruction must be read in connection with the other instructions to which appellant objects.

Instruction No. 8 was eminently correct. It deals with the nature of the plaintiff's duties and of the scope of power and authority delegated by the master to the shift boss. No. 12 advised the jury that the employee "has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe and he is not bound to inspect it for the purpose of discovering a latent defect," etc. This was correct.

There was no error in instructions 6 and 13. Complaint is made of instruction No. 9, and appellant urges that this instruction in effect told the jury that the defendant would be liable to the plaintiff in any event if it failed to properly timber, brace or support the grounds, regardless of the question of its exercise of due care. Instruction No. 9 is not capable of such a construction. This instruction among other things says: "If you find that there was negligence on the part of the master in failing to provide a safe place in which plaintiff had to work, . . . which by a reasonable inspection the defendant could have known was loose and liable to cave or fall," etc., that the defendant will be liable. This instruction specifically limited the liability to negligence on the part of the company in exercising reasonable care and due diligence. .

We find no error in the other instructions given.

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Defendant's requested instruction No. 23 might properly have been given. It was intended to inform the jury that if they found for the plaintiff, in measuring the damages to which he was entitled they should take into consideration the fact that he was not wholly disabled, and the further question as to whether or not his disability was entirely permanent. The substance of this instruction, however, was covered by the instructions given, and there was no prejudice to the defendant in the refusal of the court to give this instruction. The instruction was substantially covered by instruction 15 given by the court.

The other assignments of error have reference either directly or indirectly to the sufficiency of the evidence to sustain the verdict and judgment, and will be fully covered by a consideration of the single question as to the sufficiency of the evidence in this case to support the judgment.

It is contended by the appellant that plaintiff undertook an extrahazardous task, and that the ordinary risks of such a service were consequently assumed by him. This position is correct to the extent that he assumed the risk incident to the employment, but he did not assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition as a place of the kind in which the employee might work. (*Bunker Hill & Sul. M. & C. Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363; *Ohio Copper M. Co. v. Hutchings*, 172 Fed. 203, 96 C. C. A. 653; *Rowden v. Schoenherr-Walton M. Co.*, 136 Mo. App. 376, 117 S. W. 695.) In the case of a hazardous work like driving a tunnel, such as the one where respondent was working, an increased risk is assumed and a like increased duty is imposed by law on both the master and the servant proportionate to the dangers of the place—on the master to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant to assume or avoid patent and obvious dangers and those necessarily incident to the work and place in which the work is being prosecuted. (*Trihay v. Brooklyn*

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*Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612, 15 Morr. Min. Rep. 535; *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 69, 3 C. C. A. 433.) The law assumes that when these reciprocal duties have been faithfully discharged no injury of which the law takes cognizance will occur, but the moment an accident does occur the presumption arises that either the master or servant has been negligent, or that both have contributed to the injury.

It is contended by the appellant that if the injury in this case was caused by any negligent act, it was negligence of a fellow-servant for which the master was not liable. Now, it is a well-established rule of law, which has been adopted in this state, that the liability of the master depends upon the character of the act in the performance of which the injury arises and not upon the grade or rank of the employee or fellow-servant to whom the negligent act is traceable.

In *Larsen v. Le Doux*, 11 Ida. 49, 81 Pac. 600, this court adopted the following rule with reference to the liability of the master in such cases: "If the act or omission that caused the injury was one pertaining to the duty the master owed to his servant, he is responsible for the manner of its performance without regard to the rank of the servant or employee to whom it is intrusted. But if it is one pertaining to the duty of an operative, the employee performing it is a fellow-servant with his collaborators whatever his rank, for whose neglect the master is not liable."

It only remains to determine whether or not the duty of making the place at which respondent was working reasonably safe rested upon the master in this case or was one of the duties of respondent and his fellow-servants—the machinemen and their helpers. The evidence disclosed by the record in this case tends strongly toward the conclusion that respondent and the other machinemen and their helpers were under the absolute and direct control and supervision of the shift boss, and that they had no discretion either as to what they should do or the manner in which they should do the tasks assigned them. They were told by the shift boss when to go into the heading and begin work after shots had been fired. They were directed to the specific place to set up their machines.



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They were told when to bar down loose rock and when to shovel muck. They were shown by the shift boss the particular direction in which to point the holes and the character of load to use in each hole. The evidence also tends to show that an employee there, who offered any suggestion as to the method of doing a piece of work or protested against entering upon a special task or made any protest as to the safety of the place, incurred the risk of being immediately discharged from the works.

It seems to have been the custom of the shift boss to enter and inspect the roof and walls for the purpose of ascertaining the safety of the place before calling the men to put them to work. If he found any place where loose rock or earth needed barring down or the roof needed trimming, he directed the men in doing that work before they commenced shoveling muck or setting up their machines or drilling.

The evidence does not show either that an inspection was or was not made prior to the accident. Respondent testified that it looked safe so far as he could see when he went to work, but appellant does not show that any inspection had been made. The rock and earth which fell on respondent appears to have come from the roof of the tunnel, and the witnesses say that if the roof had been sounded, that it is reasonably certain that the accident would have been averted. They testify as to the nature of the formation and probability of a sounding having located this danger and enabled the men to bar it down before commencing to muck.

It is contended by appellant that there is no proof of any negligent act or conduct on the part of the master which caused or contributed to the injury sustained. It is true, as contended, that in all such cases negligence must be shown in some manner. (1 Thompson on Negligence, secs. 28, 50, 59; *Rysdorp v. Geo. Pankratz Lumber Co.*, 95 Wis. 622, 70 N. W. 677; *Reino v. Montana Min. Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853; *Holt v. Spokane Ry. Co.*, 4 Ida. 443, 40 Pac. 56.) This may be done by positive testimony of the performance of a negligent act by the master or the neglect by him to discharge a positive duty. It may also be shown by the condi-

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tions of the place in which he placed the servant, or the attendant circumstances surrounding the happening of the event which caused the injury.

Under the facts of this case and the circumstances under which the injury occurred, the nature of the place and the attendant circumstances as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master, who was represented by the shift boss, was negligent in the discharge of his duty in inspecting and examining or failing to inspect the place where respondent was set to work, and in not giving such directions as were necessary in order to have rendered the place safe, and thereby avoided the injury which resulted. (*Vanesse v. Catsburg Coal Co.*, 159 Pa. 403, 28 Atl. 200; *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Cinkovitch v. Thistle Coal Co.* (Iowa), 121 N. W. 1036.)

Under such circumstances the servant would not be expected or required to make an inspection of the roof and walls or the condition of the place, but had a right to assume that the shift boss, who was in that case the vice-principal, had examined and inspected the place and found it to be reasonably safe. (*Texas & Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; *Ross v. Shanley*, 185 Ill. 390, 56 N. E. 1105; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Choctaw Ry. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. ed. 96; *Crist v. Wichita Gas etc. Co.*, 72 Kan. 135, 83 Pac. 199; *Crawford v. Bonners Ferry L. Co.*, 12 Ida. 686, 87 Pac. 998, 10 Ann. Cas. 1.) Under those circumstances the servant was only bound to take notice of the conditions he saw and those dangers that were patent and obvious. In a recent case—*Rowden v. Schoenherr-Walton Min. Co.*, 136 Mo. App. 376, 117 S. W. 695—the Missouri court of appeals quoted with approval from *Gibson v. Bridge Co.*, 112 Mo. App. 594, 87 S. W. 3, as follows: "It is not supposed, when given a task to perform, that he (the servant) will, on his own motion, consume his master's time in making comprehensive inspections to detect dangers. All that is required of him is that he use his senses in the position assigned him,

and, as to dangers not to him apparent, and not inherent to the employment, he has the right to rely upon his master's judgment and humanity for the safety of his position." But aside from the evidence found in this record as to the actual duty of the master as discharged through the shift boss, and the custom which prevailed in this tunnel, it is not too much, we think, to say that as a matter of law it was the duty of the master to have an employee there in the person of the shift boss or someone else whose specific duty it should be to examine and inspect the roof and walls of this tunnel following the firing of shots and previous to setting men to work with machines and drilling holes or to shoveling muck, or other work than the specific acts making the place safe. In other words, it was the duty of the master, under such circumstances and in the prosecution of such a dangerous and hazardous work, to have some specific agent charged with the particular duty of looking after and making reasonably safe a place in which so large a number of men were crowded together in hurriedly prosecuting the master's work. This does not mean that the master must or can make the place absolutely safe. The word "safe" as used in such a case is a relative term, and is used in connection with the character of the work and the nature of the place. It must be remembered, too, that the injury was not received by the servant while engaged in the work of making the place safe.

The evidence was sufficient to justify the jury in returning a verdict for the plaintiff.

This brings us to a consideration of the question as to the excessive character of the verdict rendered in this case. The plaintiff asked for a judgment for \$15,000. The jury returned a verdict for the full amount. Maloney was twenty-nine years old at the time of this accident. He had been engaged for about nine years at similar work on railroad tunnels and mining tunnels in the states of Virginia, West Virginia, Arkansas and California. He testified that his wages during this period of nine years at tunnel work had ranged from three to five dollars per day. He was getting four dollars and ten cents per day for the work in this tunnel

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where the accident occurred, and had some kind of an agreement for a bonus whereby he says he was making a total of five dollars per day. This appears to have been an arrangement the company had with its men to expedite the work and carry it on more rapidly than would ordinarily be the case. The evidence of the experts shows that his earning capacity is reduced about fifty per cent.

The respondent has also called our attention to certain authorities on practical surgery and the treatment of fractures in which the authors deal with the particular kind of injury the respondent received in this case, namely, a "Comminuted Pott's Fracture," which tends to eversion of the foot. It is said by one of these authorities that about seventy per cent of the cases recover, so that no serious or permanent inconvenience is suffered thereafter, while the remaining thirty per cent become permanently disabled, suffering more or less in some cases, and that there is an average loss of about fifty per cent in earning capacity. So in this case the evidence of the experts as to the loss of the earning capacity of respondent resulting from the injury is in substantial harmony with the authorities submitted on the same subject. We are therefore required to deal with the question of damages awarded in this case on the theory that the respondent's earning capacity has been permanently impaired about fifty per cent. Giving the respondent the most favorable consideration his evidence will justify, as to his previous earning capacity, his greatest average earning capacity would be \$1,200 per year. To compensate him for the loss of one-half this income would entitle him to an annual income of \$600. The legal rate of interest in this state is seven per cent, and we take it that anyone can obtain that rate or better on money in this country. Seven per cent on \$15,000 would bring the respondent an annual income of \$1,050. This is manifestly excessive, and disproportionate to the injury received or the resultant loss of earning capacity.

It is conceded that the respondent's general health is not impaired. Damages in these cases must be awarded on the

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theory of a money consideration for the suffering, loss and injury which the complainant has received. A man would either be crazy or an arrant villain who would voluntarily submit to the loss of a limb for any money consideration. Indeed, damages are not awarded on the theory that the injured party has voluntarily submitted himself to the injury. On the contrary he is awarded damages because he has sustained an injury from which he himself could not, with the use of reasonable diligence, have escaped. After the injury has been sustained the only way of computing the loss is in dollars and cents, and that must be upon some theory or basis. The proper basis, and that recognized by all the authorities, is to compensate him for the loss he has sustained and will in the future sustain by and on account of the injury inflicted. Neither the law nor the one whose negligence caused the injury can restore to the victim a whole or sound body. The nearest thing, then, that can be done toward placing the party *in statu quo* is to so compensate him as to equal the pecuniary loss and diminished earning capacity entailed by reason of the injury: Watson on Damages and Personal Injuries, chap. 25.

The pecuniary and financial loss sustained can be estimated with a reasonable degree of certainty. On the other hand, the amount to be allowed for humiliation, pain and suffering entailed by the injury must be left to the arbitrary judgment of the jury (*Lindsay v. O. S. L. Ry.*, 13 Ida. 477, 90 Pac. 984, 12 L. R. A., N. S., 184; *Tarr v. O. S. L. Co.*, 14 Ida. 204, 125 Am. St. 151, 93 Pac. 957), subject only to correction by the courts for abusive and passionate exercise. (*Sloane v. Southern Cal. R. R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Watson on Personal Injuries, secs. 311, 314.)

We have made considerable research in order to ascertain the views of the several courts of this country with reference to the proper amount of damages to be awarded for an injury similar to the one received by respondent. We will briefly call attention to some of the cases.

In *Wimber v. Iowa Central Ry. Co.*, 114 Ia. 551, 87 N. W. 505, a brakeman, thirty-nine years old and in good health, was

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injured so that it was necessary to amputate one leg about six inches below the knee. A verdict was rendered in his favor for \$14,500. The supreme court held the verdict excessive and reduced it to \$8,000.

In *Budge v. Morgan's La. & Texas R. & S. Co.*, 108 La. 349, 3 So. 535, 58 L. R. A. 333, a brakeman sustained the loss of a leg, and a verdict and judgment for \$12,500 was held excessive and reduced to \$6,000. In *Chicago & N. W. Ry. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661, a brakeman sustained an injury whereby he lost both legs. A verdict of \$18,000 was held excessive, and the judgment was reversed on the ground that it would produce an income three times as large as his earning capacity.

In *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. 991, the bones of the ankle were broken and the injury was of a permanent nature. A verdict of \$8,666 was held excessive and reduced to \$5,000. In *San Antonio & Ark. Pass Ry. Co. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246, a locomotive engineer earning from \$135 to \$150 a month lost a leg. The jury awarded a verdict of \$18,000 and the court reduced it to \$16,000. In *Cogswell v. West St. etc. Electric Ry. Co.*, 5 Wash. 46, 31 Pac. 411, a carpenter received an injury to his knee which prevented him following his regular vocation. The jury returned a verdict for \$7,000 and the court reduced it to \$5,000.

In *Chitty v. St. Louis I. M. & S. Ry. Co.*, 166 Mo. 435, 65 S. W. 959, plaintiff, who had been at different times engaged in scaling logs and keeping books, received an injury to one of his legs and ankle which kept him in the hospital for nine months and fifteen days, and who was apparently permanently injured, and at the expiration of seven years after the injury, when a second trial took place, was still suffering pain and the wound not entirely healed, was awarded a verdict of \$15,000. The supreme court held the verdict excessive, and ordered that it be reduced to \$10,000. In the opinion in the case last cited there is a table of cases showing the nature of the injury and the amount of the verdict in a number of similar cases. In

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all these cases the courts held the verdicts excessive. As the same may be useful, we set them forth in this opinion. They are as follows: *Southwestern R. R. v. Singleton*, 66 Ga. 252, for fracture of leg, \$14,833; *Lombard v. Railroad*, 47 Ia. 494, for broken leg, \$4,000; *Kroener v. Railroad*, 88 Ia. 16, 55 N. W. 28, for loss of foot, \$12,000; *Slette v. Railroad*, 53 Minn. 341, 55 N. W. 137, for broken leg, \$4,100; *Johnson v. Railroad*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586, for broken ankle, \$4,000; *Bailey v. Railroad*, 80 Hun, 4, 29 N. Y. Supp. 816, for loss of leg, \$16,000; *Peri v. Railroad*, 87 Hun, 499, 34 N. Y. Supp. 1009, for loss of foot, \$10,000; *Bronson v. Railroad*, 67 Hun (N. Y.), 649, 21 N. Y. Supp. 695, for broken leg, \$11,000.

It will be seen from an examination of the foregoing authorities as well as many others that the courts have almost invariably held verdicts of anything like the amount of this excessive, and have accordingly exercised their power and authority in ordering a modification of the judgment or in granting a new trial on account of prejudice and bias of the jury in rendering such excessive verdicts. In our examination of these various cases dealing with injuries of a similar character to the one under consideration, we find that the average judgments as finally ordered by the appellate courts have been less than \$10,000. It is clear that a recovery should not be allowed to the extent of a vindictive or punitive judgment. If the master has been guilty of wanton and criminal negligence, it is the clear and unmistakable duty of the state to deal with him through the criminal laws, and to allow the servant to recover to such an extent only as will leave him as nearly as possible in as good a position as he was before the infliction of the injuries. This verdict is clearly excessive, and we have concluded that it should be reduced to \$10,000. This would insure him an annual income of at least \$700 from the principal sum. This will fully compensate him for his annual loss of earning capacity and still will give him a fair compensation for the pain and suffering inflicted by the injury.

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The judgment will be affirmed to the extent of \$10,000 on condition that the respondent file within thirty days after going down of the *remittitur* a waiver of the excess of \$5,000 and an acceptance of the judgment as thus modified. On failure to do so the judgment will be reversed *in toto* and a new trial granted. Modified and affirmed accordingly, with costs in favor of *respondent*.

Sullivan, C. J., and Stewart, J., concur.

ON REHEARING.

(December 7, 1910.)

(Syllabus by the court.)

9. The courts of this state will not take judicial notice of the laws of a sister state. In the absence of pleadings and proof as to what the laws are in another state, the courts of this state will assume that the laws prevailing in a foreign state are the same as the laws of this state.

10. Where a question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that the common law is understood and construed to be the same in the foreign state as it is in the state of the forum.

Briefs filed on behalf of Appellant by Edgar Wilson, A. G. Kerns, and F. M. Dudley.

Briefs filed on behalf of Respondent by Gray & Knight, and John H. Wourms.

The leading authorities cited by counsel on points decided are referred to in the opinion of the court.

AILSHIE, J.—A rehearing was granted in this case, and the matter was argued exhaustively orally, and four separate briefs by different counsel have been filed on behalf of appellants, in which the questions of fact involved are discussed and the authorities bearing on the case have been exhaus-



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tively analyzed and considered. The chief argument on behalf of appellant has been directed to two propositions: first, that in a case like this the master is under no obligation to furnish the servant with a safe place in which to work, that at the most "the master is only liable to the exercise of reasonable care to furnish the servant with a reasonably safe place in which to discharge the work for which he is employed." Second, it is insisted that the mere happening of an accident does not imply that the master has been negligent, but that the master's negligence must be alleged and proven.

We will first briefly notice these questions before dealing with the other questions to which less importance has been attached. It is both impracticable and impossible for the court to review and consider the multitude of authorities cited in this case. We may say, however, in the outset, that we have no serious fault to find with either of the propositions above stated for which appellant contends. To say that the master is under the duty of exercising "reasonable care" in order to make a place "reasonably safe" in which his servant is to work is substantially the same as to say "the master must furnish the servant a reasonably safe place in which to work." To say that there is any material or substantial difference between the two propositions is only a legal refinement and a theoretical distinction which is not distinguishable by a jury of practical men in drawing the line between duty and negligence. The master must use reasonable care in each instance, and that is true whether he is to furnish a "reasonably safe place" in which the servant shall work or the servant himself is employed to make the place in which he shall work. In no event is the master relieved from the exercise of "reasonable care" for the safety and protection of his employee. In the one case, however, the employee may not be able to recover because of his assumption of risk or his contributory negligence, and in another case he may be free from fault himself and the master is liable on account of his failure to exercise reasonable care. In other words, the failure of the master to discharge his legal duty by the exercise of reasonable care

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does not always subject him to liability in damages, for the reason that other intervening circumstances sometimes relieve him of liability. (*Longpre v. Big Blackfoot M. Co.*, 38 Mont. 99, 99 Pac. 131.)

Under the second proposition advanced by counsel for appellant, particular stress is laid upon the following sentence found in the original opinion, which succeeds a statement of the reciprocal duties and liabilities of the master and servant: "The law assumes that when these reciprocal duties have been faithfully discharged no injury of which the law takes cognizance will occur, but the moment an accident does occur, the presumption arises that either the master or servant has been negligent, or that both have contributed to the injury." We apprehend that the objection to the foregoing quotation arises either out of a failure to observe it closely or read it in connection with the balance of the opinion. As an abstract proposition, we think there can be no doubt as to its correctness. The presumption which it is stated arises on the happening of an accident does not, in the absence of proof, identify the party guilty of the negligence. It is stated, and we think correctly too, that as an abstract proposition the happening of an accident "of which the law takes cognizance" at once implies an act of negligence on the part of someone. It is not the law anywhere, so far as we are aware, that the mere happening of an accident is of itself proof that the *master* has been negligent and is liable for the injury and damage sustained. The happening of the accident, however, must be proven before there is any occasion for proving negligence on the part of the master. The fact of the accident and injury established, circumstances and physical conditions may be resorted to for the purpose of determining on whom the responsibility for the accident rests and to whom the negligence is imputable. In the original opinion we said:

"The evidence does not show either that an inspection was or was not made prior to the accident. Respondent testified that it looked safe so far as he could see when he went to work, but appellant does not show that any inspection had

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been made. The rock and earth which fell on respondent appears to have come from the roof of the tunnel, and the witnesses say that if the roof had been sounded, that it is reasonably certain that the accident would have been averted. They testify as to the nature of the formation and probability of a sounding having located this danger and enabled the men to bar it down before commencing to muck. . . . Under the facts of this case and the circumstances under which the injury occurred, the nature of the place and the attendant circumstances as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master who was represented by the shift boss was negligent in the discharge of his duty in inspecting and examining or failing to inspect the place where respondent was set to work, and in not giving such directions as were necessary in order to have rendered the place safe and thereby avoided the injury which resulted." (See, also, *Norman v. Wabash R. Co.*, 62 Fed. 727, 10 C. C. A. 617; *Central Coal & Coke Co. v. Williams*, 173 Fed. 337, 97 C. C. A. 597; *Haynie v. Tenn. Coal, Iron & R. Co.*, 175 Fed. 55.)

In this case the servant was not primarily engaged in making the place safe in which he worked. In this respect the case differs materially from *Thurman v. Pittsburg & Montana Copper Co.* (Mont.), 108 Pac. 588, on which appellant relies. There the servant was charged with the special duty of making the place safe. Here the servant was under the direction and control of the shift boss. It was his duty when directed by the shift boss to assist in making the place safe. The determination, however, as to what should be done and when it was necessary to perform an act looking toward the making of the place safe rested with the shift boss, and it was the duty of the shift boss to make the inspection before setting the men to work. In this case it does not appear whether an inspection was made or not. The defendant produced no evidence to that effect, and the plaintiff did not know. He did know, however, that subsequent events demonstrated that the place was not safe. He furnished proof of the physical conditions and the attendant circumstances,

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from which it might well be concluded that the inspection had either not been made, or if made had been negligently made.

Three days prior to the filing of the original opinion in this case, the court of appeals of the state of Kentucky had under consideration a case involving a very similar state of facts in *Williams Coal Co. v. Cooper* (Ky.), 127 S. W. 1000. The court said in that case:

“It is argued that, if it was the duty of the coal company to keep the room reasonably safe, this duty was performed, as the ‘loader’ whose business it was to examine the roof and put it in a reasonably safe condition performed this service; at any rate, exercised his best judgment in attempting to do so. And it is said that, as the ‘loader’ believed after inspection that the room was reasonably safe, his judgment is conclusive of the question that the master furnished a reasonably safe place. But with this argument we cannot agree. In the opinion of the ‘loader’ the room may have been reasonably safe, but the fact that the roof fell soon after his inspection demonstrates that it was not reasonably safe. . . . It is a question for the jury to say from the evidence whether or not the place was reasonably safe. And in considering this question they had the right to give such weight as they deemed proper to the statement of the inspector. They may or may not believe from it that the master discharged his duty in furnishing a reasonably safe place.”

The same court as late as June 1st of this year again had the same question under consideration in *Huddleston's Admr. v. Straight Creek Coal & Coke Co.* (Ky.), 128 S. W. 589, and after considering an argument very much like that made in this case, said:

“We cannot give our approval to a doctrine like this. The jury have the right to hear and consider, not only the evidence from the mouths of witnesses as to what they did and what was done, but they have also the right to hear and consider other evidence from witnesses who are qualified to testify as to the physical condition of the place and appliance

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before, at the time, and immediately after the accident, and the jury may from the facts and circumstances thus proven be warranted in concluding that they are entitled to more weight than the personal evidence of the witnesses whose testimony was in contradiction of these facts and circumstances. Let us take this case as an apt illustration. Notwithstanding the uncontradicted evidence of Elswick, the jury might be of the opinion, based upon the evidence of the physical conditions, that, as the roof fell soon after his inspection, he did not make a careful inspection, or, in other words, that the master did not exercise ordinary care to put and keep the entry in reasonably safe condition. This was a question for the jury, not the court, and so the court erred in taking the case from the jury.”

The accident in this case occurred in the tunnel on the Montana side of the line between Idaho and Montana. It has been argued on the rehearing that under the statutes and decisions of Montana, a recovery could not be had in this case in Montana, and that it is accordingly the duty of this court to deny the respondent any relief. On the proposition that respondent could not recover in Montana, counsel cite two cases from the supreme court of that state—*Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904, and *Osterholm v. Boston & Montana C. C. & S. M. Co.*, 40 Mont. 508, 107 Pac. 499; and on the general proposition that the respondent is bound by the law of the place where the injury occurred, counsel cite: *Baltimore & Ohio S. W. R. Co. v. Reed*, 158 Ind. 25, 92 Am. St. 293, 62 N. E. 488, 56 L. R. A. 468; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 38 Am. St. 163, 11 So. 803, 18 L. R. A. 433; *Kansas City Ft. S. & M. R. Co. v. Becker*, 67 Ark. 1, 77 Am. St. 78, 53 S. W. 406, 46 L. R. A. 814; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 66 Am. St. 397, 70 N. W. 146, 36 L. R. A. 134; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 59 Am. St. 28, 33 S. W. 857, 31 L. R. A. 276. The trouble with the application of the rules announced by these authorities is that in the present case the appellant failed to plead and prove in the lower

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court the laws of Montana as a defense to the action. We cannot take judicial notice of the laws of a sister state. In the absence of pleading and proof as to what the laws are in a sister state, we must assume that the same law prevails in the foreign state that prevails here. The authorities are uniform to this effect. This court has recognized the rule in *Moore v. Pooley*, 17 Ida. 61, 104 Pac. 898. (See 5 Ency. of Ev. 813; 2 Wharton, Conflict of Laws, 3d ed., 781 a-b; *Hall v. Pillow*, 31 Ark. 32; *Norris v. Harris*, 15 Cal. 226; *Hickman v. Alpaugh*, 21 Cal. 225; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873; *Schwartz v. Panama R. Co.*, 155 Cal. 742, 103 Pac. 196; *Justis v. Atchison, T. S. F. Ry. Co.*, 12 Cal. App. 639, 108 Pac. 328; *Bemis v. McKenzie*, 13 Fla. 553; *Hill v. Wilker*, 41 Ga. 449, 5 Am. Rep. 540; *Baltimore & Ohio Ry. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761; *News Publishing Co. v. Associated Press*, 114 Ill. App. 241; *Goodwin v. Provident Sav. Life Assur. Assn.*, 97 Iowa, 226, 59 Am. St. 411, 32 L. R. A. 473, 66 N. W. 157; *Beshears v. Nelson Distilling Co.*, 80 Kan. 194, 101 Pac. 1011; *Sandidge v. Hunt*, 40 La. Ann. 766, 5 So. 55; *McKenzie v. Wardwell*, 61 Me. 136; *Bearse v. McLean*, 199 Mass. 242, 85 N. E. 462; *Brimhall v. Van Campen*, 8 Minn. 1, 82 Am. Dec. 118; *Standard Leather Co. v. Mercantile Town Mut. Ins. Co.*, 131 Mo. App. 701, 111 S. W. 631; *Bannard v. Duncan*, 79 Neb. 189, 126 Am. St. 661, 112 N. W. 353; *Rogers v. Hatch*, 8 Nev. 35; *Hall v. So. Ry. Co.*, 146 N. C. 345, 59 S. E. 879; *Brumagim v. Chew*, 19 N. J. Eq. 130; *Harn v. Cole*, 20 Okl. 553, 95 Pac. 415; *Betz v. Wilson*, 17 Okl. 383, 87 Pac. 844; *Schlotterbeck v. Schwinn*, 23 Okl. 681, 103 Pac. 854; *Bolinger v. Gallagher*, 144 Pa. 205, 22 Atl. 815; *Jonesville Mfg. Co. v. So. Ry. Co.*, 77 S. C. 480, 58 S. E. 422; *Windhorst v. Bergendahl*, 21 S. D. 218, 130 Am. St. 715, 111 N. W. 544; *Star Clothing Mfg. Co. v. Norde-man*, 118 Tenn. 384, 100 S. W. 93; *Atchison T. & S. F. Ry. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480; *Missouri K. & T. Ry. Co. v. Wise* (Tex. Civ. App.), 106 S. W. 465; *Kinkaid v. Lee* (Tex. Civ. App.), 119 S. W. 342; *Atchison T. & S. F. Ry. Co. v. Smythe* (Tex. Civ. App.), 119 S. W. 892;

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*Clark v. Eltinge*, 38 Wash. 378, 107 Am. St. 851, 80 Pac. 556; *S. C.*, 29 Wash. 215, 69 Pac. 736; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Edleman v. Edleman*, 125 Wis. 270, 104 N. W. 56; *McKnight v. Oregon S. L. R. R. Co.*, 33 Mont. 40, 82 Pac. 661; *Crosby v. Cuba R. Co.*, 158 Fed. 144; *Cuba R. Co. v. Crosby*, 170 Fed. 369.) Where the question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred and that it is the same in that state as in the state of the forum. (5 Ency. of Ev. 817-820; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751; *Taber v. Seaboard Air Line Ry. Co.*, 81 S. C. 317, 62 S. E. 311, and cases above cited.)

Counsel for appellant finally insist that, if the judgment must be affirmed in this case, the damages even as reduced by the previous decision are still excessive. In support of this contention, counsel have cited a number of additional authorities in which the question of the amount of damages to be awarded and the age and condition of the party injured and his capacity for earning wages are all considered. As they may be useful to counsel in other similar cases, we cite them herein: 13 Cyc., pp. 134, 135; *Bosworth v. Standard Oil Co.*, 92 Hun, 485, 37 N. Y. Supp. 43; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; *Cogswell v. West St. & N. E. Electric Ry. Co.*, 5 Wash. 46, 31 Pac. 411; *Florida Ry. & Nav. Co. v. Webster*, 25 Fla. 394, 5 So. 714; *Kroener v. Chicago, M. & St. P. Ry. Co.*, 88 Iowa, 16, 55 N. W. 28; *Missouri Pac. Ry. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448; *Brown v. Southern Pac. R. Co.*, 7 Utah, 288, 26 Pac. 579; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 71 Minn. 89, 73 N. W. 707; *Moore v. W. R. Pickering Lumber Co.*, 105 La. 504, 29 So. 990; *Wimber v. Iowa Cent. Ry. Co.*, 114 Iowa, 551, 87 N. W. 505; *Bell v. Globe Lumber Co.*, 107 La. Ann. 725, 31 So. 994; *Budge v. Morgan's L. & T. R. & S. S. Co.*, 108 La. 349, 32 So. 535, 58 L. R. A. 333.

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On the other hand, counsel for respondent insist that the court erred in the original opinion herein in reducing the judgment, and that it should have been allowed to stand as assessed by the jury and entered of judgment by the trial court. In support of respondent's contention, his counsel have cited us to the following additional authorities considering the amount of damages allowable in similar cases; *Eckels v. Edison*, 139 Ill. App. 75; *Canfield v. Chicago etc. R. Co.*, 142 Iowa, 658, 121 N. W. 186; *Williams v. Spokane Falls & Northern R. R. Co.*, 42 Wash. 597, 84 Pac. 1129, also 87 Pac. 491; *Indiana etc. R. Co. v. Otstot*, 212 Ill. 529, 72 N. E. 387; *Wimber v. Iowa Cent. Ry. Co.*, 114 Ia. 551, 87 N. W. 505; *Budge v. Morgan's La. & Texas R. & S. Co.*, 108 La. 349, 32 So. 535, 58 L. R. A. 333; *Railroad Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. 991; *San Antonio & Ark. Pass. Ry. Co. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246; *Texarkana etc. R. Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 375; *The Fullerton*, 167 Fed. 1, 92 C. C. A. 463; *International & G. N. R. Co. v. Brice* (Tex. Civ. App.), 126 S. W. 613; *Galveston etc. R. Co. v. Abbey*, 29 Tex. Civ. App. 211, 68 S. W. 293; *Engler v. Western Union Tel. Co.*, 69 Fed. 185; *Jones v. N. Y. Cent. Ry. Co.*, 99 App. Div. 1, 90 N. Y. Supp. 422; *Mitchell v. Broadway etc. R. Co.*, 70 Hun, 387, 24 N. Y. Supp. 32; *Chicago etc. R. Co. v. Dunn*, 106 Ill. App. 194; *Chicago etc. R. Co. v. Spurney*, 197 Ill. 471, 64 N. E. 302; *Tully v. Steamship Co.*, 10 App. Div. 463, 42 N. Y. Supp. 29; *Illinois Cent. R. R. Co. v. O'Connor*, 90 Ill. App. 142; *Yazoo etc. R. Co. v. Scott* (Miss.), 48 So. 239; *Gale v. N. Y. Cent. R. Co.*, 13 Hun, 4; *Galveston etc. R. Co. v. Murphy* (Tex. Civ. App.), 114 S. W. 443; *Rodney v. St. Louis, Southwestern R. Co.*, 127 Mo. 676, 28 S. W. 887, and 30 S. W. 150; *Texas & N. O. R. Co. v. Parsons* (Tex. Civ. App.), 109 S. W. 240, 113 S. W. 914; *Texas etc. R. Co. v. Carr* (Tex. Civ. App.), 42 S. W. 126; *Merchants' etc. Transp. Co. v. Corcoran*, 4 Ga. App. 654, 62 S. E. 130; *Houston etc. R. Co. v. Randall*, 50 Tex. 254; *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Missouri Pac. Ry. Co. v. Mackey*, 33 Kan. 298, 6 Pac.



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291; *Trinity & S. Ry. Co. v. Lane*, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18; *O'Donnell v. American Refining Co.*, 58 N. Y. Supp. 640; *Baltzer v. Chicago M. & N. R. Co.*, 89 Wis. 257, 60 N. W. 716; *Chicago etc. Co. v. Rembarz*, 51 Ill. App. 543; *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Atchison etc. R. Co. v. Moore*, 31 Kan. 197, 1 Pac. 644; *Illinois Cent. R. Co. v. Harris*, 63 Ill. App. 172; *Lee v. So. Pac. R. Co.*, 101 Cal. 121, 35 Pac. 572; *Coleman v. Southwick*, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501; *Macon etc. R. Co. v. Winn*, 26 Ga. 250; *Davis v. Holy Terror Min. Co.*, 20 S. D. 399, 107 N. W. 374; *Morgan v. So. Pac. Ry. Co.*, 95 Cal. 501, 30 Pac. 601; *Foley v. Everett*, 142 Ill. App. 250; *Reeks v. Seattle Electric Co.*, 54 Wash. 609, 104 Pac. 126; *Burch v. So. Pac. Co. (Nev.)*, 104 Pac. 225; *Solen v. Virginia etc. Ry. Co.*, 13 Nev. 106; *McLean v. City of Lewiston*, 8 Ida. 472, 69 Pac. 478; *Howland v. Oakland Con. Co.*, 110 Cal. 513, 42 Pac. 983; *Wall v. Livezey*, 6 Colo. 465; *Ryan v. Gilmer*, 2 Mont. 523, 25 Am. Rep. 744; *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. N. B. & M. R. R. Co.*, 36 Cal. 591; *Boyce v. California Stage Co.*, 25 Cal. 460; *Wilson v. Fitch*, 41 Cal. 363.

Our further examination and consideration of the question as to the amount of damages that should be allowed has failed to convince us that any change should be made from that allowed by the original opinion. We recognize the fact that there is no absolute standard by which damages can be measured in these cases. We are of the opinion, however, that the amount awarded by the jury in this case was excessive, and in view of all the facts and circumstances, and in the light of the decisions from the various states which have considered this subject, we feel that the sum of \$10,000 to which the judgment was reduced by the original opinion is fair and as near an approximation to justice in the case as we can reach.

We feel that we should not close the consideration of this case without reverting to one argument that has been made in the briefs on behalf of appellant which does not have to do with the law of the case so much as with the public

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policy of the state. It has been argued with a great deal of zeal that the rule of law as announced in the original opinion is entirely too harsh on the master, and if permanently adopted in this state, will have the tendency to discourage investments, the building of railroads and street and electric car lines, power plants, mining development, and will generally retard the growth and development of the state's resources and industries. We feel that this apprehension is wholly unfounded, and arises more out of a fear of an erroneous application of the rule we have announced than of any error of severity in the rule itself. The resources and industries of this state ought to be developed, and it is the hope of every citizen, including the members of this court, that railroads may be built, mines developed, and diversified industries built up, and it is not the temper or purpose of the court to promulgate any rule of decision that will hamper or deter any legitimate enterprise or industry, but we do want to be understood as insisting that this march of progress and development shall not come at a sacrifice of human life and safety, or in disregard of the common rights of the laboring man who shall furnish the brawn and sinew for that work.

After a somewhat laborious and tedious examination of this case a second time, we feel that the original opinion correctly states the principles of law applicable to the case, and that the conclusion reached on the former hearing should stand as the judgment of the court in this case. The judgment of the trial court will therefore be affirmed to the extent of \$10,000, on condition that the respondent file within thirty days after the going down of the *remittitur* a waiver of the excess of \$5,000 and an acceptance of the judgment as thus modified. On failure to do so, the judgment will be reversed *in toto* and a new trial granted. Modified and affirmed accordingly, with costs in favor of the respondent.

Sullivan, C. J., concurs.

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Points Decided.

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(May 14, 1910.)

MARTIN WALSH, Respondent, v. WINSTON BROS. COMPANY, a Corporation, Appellant.

[111 Pac. 1090.]

MOTION FOR POSTPONEMENT OF TRIAL—FELLOW-SERVANT—ASSUMPTION OF RISK—DUTY OF MASTER—CONFLICT OF EVIDENCE—MISCONDUCT OF JUROR—NEW TRIAL.

(Syllabus by the court.)

1. A motion for a new trial is addressed to the sound discretion of the trial court, and the court's ruling thereon will not be disturbed on appeal unless it appears there has been an abuse of such discretion.

2. A party is not entitled to a continuance without showing due diligence and the use of legal means to procure the desired evidence, or a clear and sufficient excuse for not resorting to such legal means. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law.

3. In an action to recover damages for personal injuries, evidence which tends to show the respective duties and relations of the alleged principal and his employees, as well as their relations to the business generally, and all of the surrounding circumstances, is admissible to aid in determining whether the injured employee sustained such injury by reason of the negligence of a fellow-servant or of a vice-principal.

4. Evidence in this case examined and held to support the verdict of the jury.

5. *Maloney v. Winston Bros. Co.*, ante, p. 740, 111 Pac. 1090, cited and approved as the law governing this case.

6. It is not error for the trial court to deny a motion for a new trial on account of the intoxication of a juror, where it clearly appears that such intoxication is brought on by the indulgence of the juror during a recess of the court and when the jury is permitted to separate, and no motion is made at the time that the panel be discharged and a new jury selected, or that the particular juror be discharged and another juror selected in his stead, or any objection made to resuming the trial on account of the intoxication of such juror, and it further clearly appears as a fact that the trial was not resumed until the juror had fully recovered his normal condition and faculties, although such conduct of the juror calls for severe censure and punishment from the trial court.

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Argument for Appellant.

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APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

An action to recover damages for personal injury. Judgment for plaintiff. Defendant appeals. Judgment *modified* and *affirmed*.

Kerns & Ryan, for Appellant.

The accident in the case at bar was caused from the nature of the work and not from the place where he was working. It was one of the risks incident to the kind of work in which he was employed. This we believe is a true test. (*Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; 2 Labatt on Master and Servant, sec. 600; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Capasso v. Woolfolk*, 163 N. Y. 472, 57 N. E. 760; *Vitto v. Farley*, 36 N. Y. Supp. 1105, 15 Misc. 153; *Porter v. Silver Creek & M. Coal Co.*, 84 Wis. 418, 54 N. W. 1019.)

After the defendant has furnished the proper instrumentalities and competent employees, it has discharged its duty. It is presumed, in the absence of any evidence to the contrary, that any duty which the law imposes has been properly performed and a servant must, in order to make out a *prima facie* case which will entitle him to go to the jury, produce some evidence which tends to destroy the force of the presumption in the given instance. (Labatt on Master and Servant, sec. 832; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. ed. 361; *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 Am. St. 807, 39 Atl. 292, 39 L. R. A. 842.)

Upon problematical causes negligence cannot be predicated. (*Minty v. Union Pacific R. Co.*, 2 Ida. 471, 21 Pac. 660.)

"The master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger. Servants are expected to keep their eyes open, and exercise such reasonable care for their own safety as their situation permits." (4 Thompson on Negligence, sec. 4065; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40.)

## Argument for Respondent.

"A master is not required to furnish the servant with a safe place to work as against a danger which is temporary, and arises from the hazard and the progress of the work itself, and is known to the servant, who in such case assumes the risk therefrom." (*Davis v. Mining Co.*, 117 Fed. 122, 54 C. C. A. 636; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. ed. 440; *Nolan v. Shickle*, 3 Mo. App. 300; *Schultz v. Pacific Ry. Co.*, 36 Mo. 13; *Koontz v. C. R. I. & P. R. Co.*, 65 Ia. 224, 54 Am. Rep. 5, 21 N. W. 577; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *McKee v. C. R. I. & P. R. Co.*, 83 Ia. 616, 50 N. W. 209, 13 L. R. A. 817.)

"The foreman of a gang of laborers employed by a contractor is a fellow-servant of one of the gang." (*Anderson v. Winston*, 31 Fed. 528; *McDonald v. Buckley*, 109 Fed. 290, 48 C. C. A. 372; *New England Ry. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. ed. 181; *Armour v. Hahn*, *supra*; *Chicago & Ohio C. & C. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Beesley v. Wheeler Co.*, 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; *Shaw v. Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Larsen v. Le Doux*, 11 Ida. 49, 81 Pac. 600.)

Gray & Knight, John H. Wourms, and Walter H. Hanson,  
for Respondent.

It was the duty of the appellant to furnish and maintain a reasonably safe place for the plaintiff to work. (*Bunker Hill & Sullivan M. & C. Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363; *Rowden v. Schoenherr-Walton M. Co.*, 136 Mo. App. 376, 117 S. W. 695; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612; *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433; *Ross v. Shanley*, 85 Ill. 390, 56 N. E. 1105; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Ohio Copper Min. Co. v. Hutchings*, 172 Fed. 201, 96 C. C. A. 653.)

The master is liable for the negligence of an employee who represents him in the discharge of his personal duties to his servants. (*Larsen v. Le Doux*, 11 Ida. 49, 81 Pac. 600; *Bunker Hill & Sullivan M. & C. Co. v. Jones*, *supra*; *Hough v. Texas & Pacific Ry. Co.*, 100 U. S. 213, 25 L. ed. 612; *Crist v.*

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*Wichita Gas, Electric Light & Power Co.*, 72 Kan. 135, 83 Pac. 199.)

The facts in this case show that there was nothing to indicate to the plaintiff, from such inspection as he could or was permitted under the rules and practice of the tunnel to make, that he was assuming any such danger as the accident showed existed. He was justified in assuming that the master, either personally or through its representative, had properly inspected and safeguarded the place in which he was to work. (*Choctaw etc. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. ed. 96; *Texas & Pacific Ry. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. ed. 1188; *Texas & Pacific Ry. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 382; *Choctaw v. Holladay*, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. ed. 207; *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. ed. 984; *Ohio Copper Min. Co. v. Hutchings*, 172 Fed. 201, 96 C. C. A. 653; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Diamond Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060; *National Steel Co. v. Hore*, 155 Fed. 62-65, 83 C. C. A. 578.)

Even though the trial court refused to allow a question directed to a juror which might have demonstrated his incompetency, yet if the appellant did not make a peremptory challenge of such juror and had not exhausted all of his peremptory challenges, such error on the part of the trial court would not be reversible error. (*Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Anarchists' Case*, 122 Ill. 1, 3 Am. St. 320, 12 N. E. 865, 17 N. E. 898; *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Williams v. State*, 30 Tex. App. 354, 17 S. W. 408; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075.)

STEWART, J.—This is an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff and caused by the defendant's negligence while in the employ of the defendant in the construction of a certain tunnel along the line of the Chicago, Milwaukee and St. Paul railroad known as the St. Paul Pass tunnel, being a tunnel beneath the divide of the Bitter Root Mountains be-

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tween the states of Idaho and Montana. The cause was tried to a jury and a verdict returned for the plaintiff in the sum of \$20,000. A motion for a new trial was made and overruled. This appeal is from the judgment and from the order overruling a motion for a new trial.

When the case was called for trial on June 1, 1909, the appellant made a motion for a postponement of the trial until the next term of court. This motion was based upon the affidavit of one E. G. Trimper. In this affidavit Mr. Trimper swears that he is the agent of the Ocean Accident Insurance Corporation, who assured Winston Bros. Company with respect to the employees engaged in the construction of the St. Paul Pass tunnel, and as such has had charge, and it has been made his duty to prepare the above-entitled cause for trial; that after the case was set for trial on the — day of April, 1909, he began to investigate and locate the whereabouts of the witnesses and arrange for their attendance; that one William Ryan is an important witness. Then follows what it is claimed Ryan will testify to. The affidavit states that the affiant is informed and believes that Ryan is in the state of California and beyond the jurisdiction of the court, and that he could not be located in time to take his deposition before the day set for the trial; and affiant believes that if the action be continued, by the next term of court the attendance of the witness could be procured or his deposition taken. The affidavit then alleges that one George Parr is a material and important witness and states what such witness, if present, would testify to; that such witness is not, and has not been, within the jurisdiction of the court for some months last past; that as soon as this case was set for trial affiant made effort to locate the said witness and procure his attendance; that he located the witness in the city of Spokane, Washington, only a few days prior to the time of making the affidavit and too late to take his deposition, but that he saw the witness, and the witness promised that he would be present at the trial, but that the witness failed to keep such promise; that affiant lately learned that the witness had gone to California; that as soon as affiant found that the witness was not here on May

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31st, he instituted inquiries to ascertain why, and learned that the witness had been called to California, and that if the cause be continued over the present term, the witness could be procured or his testimony can be had at the next term; that Dr. T. J. White is an important witness, and then follow the facts such witness will testify to; that said witness at the time the affidavit was made was in charge of patients at work along the line of the Chicago, Milwaukee and Puget Sound Railway on the St. Joe river, and agreed with affiant that he would attend this trial, and was in Wallace on the 30th and 31st days of this month, and on the morning of the 31st left Wallace by train and went to Taft; that affiant talked with the witness over the phone and requested the witness to return, and the witness told affiant that he had been called to the camps; that his personal presence was necessary, and that he was unable to get anyone to take his place, and it would be impossible for him to return; that he would remain in Wallace except for the fact that he was called away on account of sickness; that by reason of his employment by the Ocean Accident & Guaranty Corporation he is also the acting claim agent of Winston Bros., and has committed to him the preparation of the trial of this cause and the procuring of witnesses.

Counter-affidavits were filed, one by Walsh and the other by John P. Gray, of counsel for the plaintiff. Mr. Walsh swears that the work on the tunnel where the accident occurred has been practically completed, and that the men who have been employed are about to leave and that the plaintiff is without means to retain the witnesses, and if the cause is continued, witnesses to be called by plaintiff will go to other work and he will be deprived of their testimony at the trial. In Mr. Gray's affidavit he swears that the complaint was filed on Dec. 21, 1908, and the defendant appeared on Jan. 22, 1909; that a demurrer was filed and overruled on Jan. 27, 1909; that on March 20th an amended complaint was filed, and on March 30th the motion to strike and a demurrer were filed, and on April 6th an amended demurrer was filed and overruled, and on April 7th the motion to strike was over-



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ruled. On April 17th the defendant answered, and on April 21st the cause was set for trial May 31st, and at the time said cause was set for trial George E. Marlowe, of counsel for the defendant, was present in court, and although plaintiff insisted upon an early trial, counsel for defendant objected, and the cause, for convenience of counsel for the defendant, was set for May 31st, and thereafter the cause was continued until June 1st; that when the cause was called for trial on June 1st the defendant presented to affiant an amended answer, and the court asked counsel if they were ready, and the plaintiff announced that he was ready, and the defendant desired a continuance until 2 o'clock to prepare affidavits. This affiant also swears that the witness White for a long time past has been a citizen and resident of Shoshone county, Idaho, and that said White was in Wallace on May 30 and 31 to visit his family, and not to become a witness, and that E. G. Trimper knew White was engaged as a physician in charge of the sick and injured employees along the railroad, and that a subpoena has never been issued for such witness.

Upon the showing thus made the trial court overruled the application for a continuance. The court committed no error. It is the rule in this state that a motion for a continuance is addressed to the sound discretion of the trial court, and his ruling thereon will not be disturbed on appeal unless it appears there has been an abuse thereof. (*Storer v. Heitfeld*, 17 Ida. 113, 105 Pac. 55.) A party is not entitled to a continuance without showing due diligence and the use of legal means to procure the desired evidence. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law. (*Rankin v. Caldwell*, 15 Ida. 625, 99 Pac. 108.) It is apparent from the showing made in this case that after the cause was set for trial the appellant took no steps to ascertain the whereabouts of the witnesses desired, or to procure their testimony. All that is stated in the affidavit may have been true, and yet by the exercise of proper diligence and legal means the evidence of such witnesses could have been procured. The trial court committed no error in overruling the motion for a continuance.

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Assignments 2, 3, 4, 5 and 6 relate to the ruling of the court upon objections made to certain questions asked the jurors. An examination of the record, however, does not show that objection was made to any question asked a juror, or that the court was called upon to rule upon any question asked a juror, or that an exception was taken to the ruling of the court on any question asked a juror. The record, therefore, does not support the assignments of error.

Certain questions were asked plaintiff and other witnesses with reference to who had charge of the men in the tunnel and who discharged and employed men and what were the duties of the shift boss; and it is claimed that the court erred in permitting such questions to be asked. In the case of *Larson v. Le Doux*, 11 Ida. 49, 81 Pac. 600, this court quotes and approves the rule announced in sec. 23 of McKinney on Fellow-servants as follows:

“The true test, it is believed, whether an employee occupies the position of a fellow-servant to another employee, or is the representative of his master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.”

Evidence, therefore, which tends to show the respective duties and relations of the alleged principal and his employees as well as their relations to the business generally, and all of the surrounding circumstances, is admissible to aid in determining whether the injured employee sustained such injury by reason of the negligence of a fellow-servant or a vice-principal. (*Lebanon Coal & Min. Assn. v. Zerwick*, 77 Ill. App. 486; *White on Personal Injuries in Mines*, sec. 294.) Any evidence, therefore, which tended to aid in determining whether the shift boss was a fellow-servant or a vice-principal was admissible.

The accident referred to in this case occurred in the same tunnel as the accident under consideration and involved in

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the case of *Maloney v. Winston Bros. Co.*, ante, p. 740, 111 Pac. 1080, just decided by this court. The circumstances surrounding the accident in that case are almost identical with the circumstances surrounding this case in so far as the relations the appellant and the respondent bear to such accident. The principles of law laid down and discussed in that case are directly applicable, and must control this case. It can serve no purpose to enter into a detailed discussion of the specific questions involved in the present case which were passed upon in that case, as the opinion in that case is affirmed and followed.

From the evidence in this case it appears that the respondent was injured in the east end of what is known as the St. Paul Pass tunnel. The method of construction as shown by the evidence was about as follows: A heading was first driven and was the upper portion of the tunnel. Two or three hundred feet back of the heading the lower part of the tunnel was excavated and this was called "the bench." The rock removed from the heading was conveyed on cars running on tracks laid on the top of the bench until such cars came within a few feet of the end of the bench, when they ran up an incline to the high line and ran back of the operations at the end of the bench and were there dumped into the cars which conveyed the rock out of the tunnel. The high line thus referred to was a temporary elevated track laid upon cross-pieces for the purpose of taking the cars over the heads of the men who were working at the bench to a short distance back of them where the cars were dumped.

F. J. McIsaacs, the general superintendent who had charge of the construction of such tunnel, described the method of carrying on the work in the tunnel and the distribution of the workmen and their duties as follows:

"Under me at each end of the tunnel was a general foreman, or, as commonly known, a walking boss. Under the walking boss were shift bosses, two for the heading and two for the bench, and sometimes a timber boss in addition. The shift boss was a foreman, or a boss, who directly superintended or looked after that portion of the work over which he had charge, taking his directions from the walking boss.

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For the most part there were under the direction of the shift boss five machine men and five helpers, and from fifteen to eighteen muckers and a shovel crew, consisting of an engineer and trainmen on the steam shovel. I am speaking of the bench.

“There would be four machines down on the bottom and one on the top. Immediately following the shot, after the smoke had sufficiently removed so that the shift boss could examine it, he went forward and examined the muck pile; placed his men with a view to bar down that portion of the rock which had not been entirely thrown back or fallen down by the shot. The shovel crew and muckers moved up and the shovel and muckers cleaned off the track, as the rock frequently flew for a considerable distance back; steam shovel was moved ahead and began to clean the muck up and began dumping it into the cars; the machinemen and helpers went on top to bar down the loose material following down the muck as the shovel cleaned it up. So the work was done from the top to a point where there was not enough room for the shovel to get hold of it, and right at the bottom of the bench there was a little which the shovel could not take, and that was shoveled up by the men. All loose material must, of necessity, be removed because the drill can't work against a loose face. The duties of the machinemen were to bar down the loose rock on their portions of the work. There were four machines at the bottom of the bench and one on top. The top crew removed all loose material such as would interfere with the men working on the top. The right-hand machinemen cleaned the right-hand face of the work; the center right-hand crew did the same; the others on the left the same, each crew taking care of that portion of the work where they were supposed to drill. After they had removed all loose rock, the tripods were brought forward and they set up the machine. After the shot had been fired and after the men went into the face of the bench for the purpose of examining the work, the machinemen were supposed to know their duties; they were supposed to bar down the rock at the work they were on. It was not necessary for them to be instructed,

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except a new man, who would be told by the shift boss. During the progress of the work, I was there about twice a day and sometimes oftener. No instructions were ever given to a shift boss to discharge any man for barring down loose rock or overhanging or dangerous places, without special instructions from the shift boss. The plan of that work was first for safety. My general instructions to the men were to always make the work safe and look after the men, and progress was a secondary condition. The machinemen and helpers were expected to bar down all loose material without special instructions from anybody. . . . The machinemen and helpers barred down whatever loose rock they might find from the muck pile, and after the removal of the muck, from ladders. The muck pile or ladders would enable them to reach every portion of the bench and to reach loose rock that might be up there. Ordinarily, the walking boss hired the men—that was one of his duties to see that his crews were filled. There was times when he was not in the tunnel, and the shift boss going on might find himself short, and while it was the general custom for the walking boss to hire all men, it not infrequently happened that the shift boss hired men, but it wasn't the general plan."

The plaintiff went to work for appellant on the 6th or 7th of March and was injured on the night of the 8th or 9th of March, thus having been in the employ of the appellant, at the time of the accident not more than two days; and with reference to the injury he testifies as follows:

"It was our duty to be in there at work about half-past 6, and as I got in there about that time, within a couple of hundred feet of the face of the bench, the day shift was coming out, and they were after blasting a number of holes in the face of the bench. But as they passed out the shift boss goes into the lead and the men follows him in; so we got into the face of the bench, and there was a lot of rock broke loose and the shift boss told us, 'You get on top of the bench and bar it down.' We got on top of the bench—there were eight men, four machinemen and four helpers—two on the right-hand side and two on the left. Me and my partner was

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working on the right-hand center, and we picked away there for about half an hour. The shift boss came to me then and told me that our place was pretty good, to get down and pick down the face. So we jumped on the loose part of the rock, about five feet below, and started to pick down the face. The two men on the right-hand side picked on top and the shift boss hollered to them and told them to stop and they stopped. The shift boss told them to get off the top of the bench, that they could stay up there picking until they got into the heading—to get down and secure the face. So they got down on the loose pile of rock, and as the steam shovel was taking up the loose rock we followed it down to the bottom picking the face; and as we got within three or four feet of the bottom, the shift boss told us to get out of the road until the steam shovel got all the loose rock. We went back of the steam shovel and stayed there. After we went back of the steam shovel we waited until the steam shovel had scraped up the last few shovelsful and they ran the steam shovel close up to the face of the bench, and they ran it up against the face a couple of times and told them to shovel it around and get it into the car; then the shift boss told me and my partner to go out and get our machines, and we brought in a tripod and that time the shift boss told us to bring in a small machine. He said, 'It is so much lighter and handier, and I want you to drill in a hole or two in the bottom as quick as the devil will let you.' So we took in the tripod and set it in the right-hand center, and when we had it in position there, the shift boss came to me and my partner and told us to move it over to the right-hand side about three or four feet. At that time I asked the shift boss if I could go up on top of the bench and see if there was anything loose up there, and he said, 'That's my business.' He said the rock was solid, if not the steam shovel would pull it down. . . . I was not working in that part of the bench and I did not examine that ground. So we got the tripod in position there, and we went out and took in the machine and got the machine on top of the tripod and the hose connected, and a drill in the piston. Then I asked the shift boss where he wanted the hole driven, and the

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shift boss came over and got at the back end of the machine crank. It was loose on the swing bolt at that time, and he moved it around until he got it into the place where he wanted it, and he told us to tighten it up there and drill in that place. We started in to drill, and we had four or five inches of a hole drilled when the shift boss came to me again and asked me how I was getting along, and I says, 'Not very good; a little slow.' He said, 'What's the matter?' and I told him there was a lot of water falling down washing loose rock into the hole, and he says, 'Take the drill out and clean the hole, and do it pretty often, and don't let it take you all day to get a hole in.' So my partner took out the drill and I went in to clean the hole out, and I was stooping down when a large mass of rock fell from the top of the bench and hit me on the leg and broke it. At that time the bench was about fifteen feet high and the tunnel twenty-one or twenty-two feet wide. The shift boss wanted us to drill a hole in the side to make room for a mudsill. . . . After this rock hit me and knocked me down, the men went over to me and stopped the machine and grabbed hold of me and tried to pull me back, and in a few minutes after they done that, another mass of rock fell down, and they looked around a little while until they thought it was safe, and they came up again and grabbed hold of me by the shoulders, and some got shovels and took a big rock off my leg. My right leg was not held. When they got me back, I was lying there about twenty minutes while they went out to the commissary for the stretcher, and I asked the shift boss if he would bring the stretcher in on the motor car, that he could bring it in much faster; that I was getting cold, and the shift boss said he would have it in as soon as he could. I was watching the place all the time where the rock fell from. It looked to me to be about two feet or so from the right hand. It left a gap there about three feet wide. It broke back from the face two or three feet and down the face two or three feet. My leg was buried up in there quite a ways; some large chunks and some broke up; it looked to me like there was a ton of rock there. The place that this rock came from was within

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about a foot or two to the place that I was working on, on top of the bench—on the right-hand side of that.”

The evidence of this witness also shows that after the injury he was taken to the hospital, where on the 13th of March his leg was amputated. After the amputation an abscess formed on the left side of the leg and the respondent suffered great pain, and at the time of the trial it had not wholly healed. He was earning at the time of the accident three dollars and seventy-five cents a day, and testified that he had been a miner for the last twenty years and during which time he had not received less than three dollars and fifty cents and sometimes four dollars per day.

There is a conflict in the evidence as to the duties of the shift boss and as to the inspection of the face of the bench from which the rock fell that injured the plaintiff, and also as to the condition of the rock after the blast and before it fell. On the other facts as testified to by the plaintiff and as shown by the evidence of McIsaacs, there is no substantial conflict. To our minds, the evidence clearly shows that at the time the accident occurred the respondent was working and doing the particular act under the specific direction of the shift boss, and that he had no discretion as to the place he was working or as to spending any time or putting forth any effort in ascertaining the character and safety of the surroundings, or in putting such surroundings in a safe condition. This very forcibly appears from a remark made by the shift boss to the respondent just prior to the accident. The plaintiff testifies: “The shift boss came to me and my partner and told us to move it over the right-hand side three or four feet (referring to the tripod). At that time I asked the shift boss if I could go up on top of the bench and see if there was anything loose up there and he said, ‘That is my business.’ He said the rock was solid. If not the steam shovel would pull it down. I was not working in that part of the bench and I did not examine that ground.”

There is other evidence which corroborates in effect the evidence of the plaintiff, and when the evidence is considered as a whole, it is clearly sufficient to sustain the verdict of the



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jury and clearly establishes that the shift boss was acting for the appellants, was a vice-principal, and that the appellants were negligent in not inspecting and making safe the place where the plaintiff was directed to work by the shift boss, and at which he was engaged in working at the time of the accident. Under the evidence in this case, the plaintiff had a clear right to assume, as said by this court in the Maloney case, "That the shift boss, who was in that case the vice-principal, had examined and inspected the place, and found it to be reasonably safe."

Counsel for appellant claims as error the giving of certain instructions and the refusal to give other instructions asked by the appellant. The instructions thus referred to are practically the same as those discussed in the Maloney case, and we find no prejudicial error in the rulings of the court.

One of the grounds upon which the motion for a new trial is based was misconduct of the jury, and in support of this motion affidavits were filed by four persons, one of whom was of counsel for the appellant, in which it was stated that one of the jurors, Johnson by name, was intoxicated during the trial. The trial judge also certifies that at the opening of court on the fourth day of June, 1909, after the jury had been called, the judge's attention was directed to the fact that one of the jurors was intoxicated, and upon looking at the jury the judge discovered that he was "not sober" and placed him in the custody of the bailiffs to be sobered up, and ordered an adjournment of the case until 2 o'clock in the afternoon: that prior to the opening of court at 2 o'clock in the afternoon the judge saw the juror and he seemed to be perfectly sober, and he was informed by the bailiffs who had charge of such juror that he had not been allowed any intoxicants while in their custody, and that at 2 o'clock the trial was resumed without objection upon the part of either plaintiff or the defendant.

The affidavits of three of the persons filed in support of the motion for a new trial also state that they met the juror Johnson during the afternoon of June 3d in the barroom of a hotel, at which time Johnson expressed his opinion as to the

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kind of verdict that should be brought in, and the juror stated that the jury ought to give a big verdict in favor of the plaintiff, and that one Denny was present at the time such conversation took place and was intoxicated and did most of the talking. This conversation and place of meeting is absolutely denied by Johnson. From the record there can be no question but that the juror Johnson was in an intoxicated condition at the opening of court on the morning of June 4th, and it appears that the trial did not proceed at that time on account of such intoxication, and that when the trial was resumed at 2 o'clock of said day the juror was in a sober condition. It appears that the jury were not kept together during the recess of the court, but were permitted to separate, and that after the adjournment of court on June 3d, the juror Johnson was seen in what appeared to be an intoxicated condition, and that this condition had not wholly disappeared, and the juror fully restored to rational consciousness by the elimination of the intoxicating effect on the morning of June 4th when court convened; and it affirmatively appears that the court did not proceed with the trial or receive any evidence or hear any argument, and took no action which called for attention and consideration by the jury during the time the juror was in an intoxicated condition, and that no objection was made by either party to the resumption of the trial or motion made to discharge the panel and to impanel a new jury, or to discharge the particular juror and impanel another juror in his stead.

There is, therefore, nothing in the record which shows that the juror was in a condition which incapacitated him from performing his duties as a juror during the actual progress of the trial, or that the appellant could have in any way been prejudiced by the condition of the juror while court was in session. The conduct of the juror, however, was such as to call for a severe reprimand by the court, which should have been followed by a proper and adequate punishment for indulging in intoxicating liquors during the recess of the court to such an extent that the court was forced to take an adjournment and postpone the trial because of the said juror's

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condition. A citizen who has been accepted as a juror should regard the duty thus imposed upon him as of sufficient importance and responsibility that he will conduct himself so as not to be disabled or incapacitated in the discharge of such duty. If this lesson has not been learned, or is not fully appreciated, the court should not overlook the opportunity of so instructing the juror and impressing such fact upon his mind, if necessary, with a liberal and certain punishment. that will have an everlasting effect. And it should be done in such a way that the public generally may be impressed with the lesson thus given and its importance.

The allegations contained in the affidavit as to what the juror said as to the kind of verdict which should be returned are very uncertain, and in view of the circumstances detailed in the affidavits, we are not inclined to interfere with the conclusion of the trial court that the facts thus stated were not sufficient to warrant the granting of a new trial. Trial courts should be very careful to see that jurors properly conduct and deport themselves after having been accepted as jurors, and they should not tolerate or permit any act or indulgence which in any way will incapacitate the juror from performing his duty or deny to the litigants a fair and capable judgment of the jurors.

The amount of the judgment in this case is urged as excessive. The evidence in this case shows that the plaintiff was a man forty-two years of age; that his average earning capacity was three dollars and seventy-five cents per day, and under the rule announced in the Maloney case we are satisfied that the judgment is excessive. The judgment in this case will be affirmed to the extent of \$12,000, on condition that the respondent file within thirty days after going down of the *remittitur* a waiver of the excess of \$8,000 and an acceptance of the judgment in the sum of \$12,000 as thus modified. Upon failure to accept the judgment as thus modified, the judgment will be reversed *in toto* and a new trial granted. *Modified and affirmed* accordingly, with costs in favor of the *respondent*.

Sullivan, C. J., and Ailshie, J., concur.

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Opinion of the Court—Ailshie, J., on Rehearing.

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## ON REHEARING.

(December 7, 1910.)

Briefs filed on behalf of Appellant by Edgar Wilson, F. M. Dudley, and A. G. Kerns.

Briefs filed on behalf of Respondent by Gray & Knight, Walter H. Hanson, and John H. Wourms.

AILSHIE, J.—This is a companion case to the case of *Maloney v. Winston Bros. Co.*, ante, p. 740, 111 Pac. 1080 just decided. A rehearing was granted in this case for the same reason that a rehearing was had in the Maloney case. The accident here involved occurred in the same tunnel where the injury occurred in the Maloney case. The circumstances under which the accident occurred differ slightly in this case from the other case. The law applicable here, however, is the same as the rule applied in the Maloney case, and upon the authority of that case the judgment in this case as modified on the original hearing will be affirmed.

It can serve no useful purpose for us to again review the evidence in this opinion, as we are satisfied that there was sufficient evidence to justify the jury in concluding that the master was guilty of negligence and that the servant was entitled to recover for the injury sustained.

The judgment will be affirmed to the extent of \$12,000, on condition that the respondent file within thirty days after the going down of the *remittitur* a waiver of the excess of \$8,000 and an acceptance of the judgment in the sum of \$12,000 as thus modified. Upon failure to accept the judgment as modified, it will be reversed *in toto* and a new trial granted. Modified and affirmed accordingly, with costs in favor of the respondent.

Sullivan, C. J., concurs.

Idaho, Vol. 18—50



# **Memorial Resolutions**

**RELATING TO**

**Deceased Members of the Court.**

**(787)**



## In Memoriam.

### IN THE MATTER OF RESOLUTIONS COMMEMORATIVE OF THE DEATH OF THE HON. JOSEPH WALDO HUSTON.

The committee heretofore appointed to draft suitable resolutions in commemoration of the death of Joseph Waldo Huston on this day appeared in open court and submitted the following:

WHEREAS, in the death of the Hon. Joseph W. Huston we are called upon to mourn the loss of a distinguished citizen, an able jurist and member of the Bar of this State; one who was intimately associated with the history of Idaho, both as a Territory and as a State; we say distinguished with due appreciation of the extensive application of the term.

RESOLVED: That we are glad to remember that by natural and acquired abilities he was an orator of remarkable power, capable of moving courts and juries, as but few advocates could, to a recognition of the justice of his cause;

RESOLVED: That as one of the Justices of the Supreme Court of the State of Idaho for a period of ten years he was always ready and anxious to accord to each member of the Bar a fair and impartial hearing, and to give to each cause that consideration which seemed to be proper and necessary.

RESOLVED: That as an advocate he was ever courteous and dignified both to the Bench and Bar; genial and entertaining in his associations with all the members of his chosen profession, and, after many years of intimate acquaintance with him in and out of court, we are glad to give expression to our appreciation of his many good qualities, both as a citizen and as a lawyer.

RESOLVED: That we ask this Honorable Court to spread this slight testimonial of our appreciation of the many good



qualities of our departed brother upon its records and furnish a copy to his bereaved family.

Adopted at Boise, June 30, 1905.

R. P. QUARLES,  
JOHN T. MORGAN,  
JAMES H. HAWLEY,  
W. E. BORAH,  
EDGAR WILSON,  
Committee.

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## In Memoriam.

### IN THE MATTER OF RESOLUTIONS COMMEMORATIVE OF THE DEATH OF HON. JOHN R. McBRIDE.

The committee heretofore appointed to draft suitable resolutions in commemoration of the death of Hon. John R. McBride on this day appeared in open court, and submitted the following:

WHEREAS, this physical life comes to us we know not how or when, whether it is but a machine, having neither life nor sensation, or whether it is all of life, it is to us real, as real as any being we can see, feel, hear and love.

THEREFORE, it is with deep regret that we are called upon to announce and to mourn the death of our esteemed and distinguished friend and fellow-member of the Bar, the skilled statesman and the learned jurist, the Hon. John R. McBride;

RESOLVED, therefore, that we claim with three other great states of the republic, the privilege of holding him in grateful remembrance.

RESOLVED: That he honored the State of Oregon as her representative in Congress, in his early manhood; that he gave the State of Idaho proof of his great ability and probity as her Chief Justice in her early territorial days; that he

left enduring landmarks of his learning and industry upon the laws and in the courts of Utah; that in later life he honored his profession and gave credit to us, his fellow-workers, as a member of the Bar of Washington; that although he passed away full of days and full of honors, we mourn his departure because we loved his genial smile, and his many companionable qualities, and we shall not cease to miss him, because we do not see any who can quite fill his place, a man of rare excellencies, in both natural and acquired abilities.

RESOLVED: That we ask this Honorable Court to spread upon its records this evidence of our appreciation of his worth; and that a copy thereof be furnished his family.

Adopted at Boise, June 30, 1905.

Respectfully submitted,

JOHN T. MORGAN,  
JAMES H. HAWLEY,  
F. E. ENSIGN,  
JONAS W. BROWN,  
Committee.

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## In Memoriam.

### HON. HUGH W. WEIR.

TO THE HONORABLE THE SUPREME COURT OF THE STATE OF IDAHO:

Your committee heretofore appointed to report to the Court a suitable testimonial of regard for the memory of the Hon. H. W. Weir, late Chief Justice of this Court, beg leave to present the following:

WHEREAS, it has pleased the Supreme Ruler of the Universe to call to his final home the Hon. Hugh W. Weir, ex-Chief Justice of this Court, and an honored member of the Bar of this Court;

THEREFORE, BE IT RESOLVED, That the Bar of the Supreme Court of the State of Idaho recognize in the ex-Chief Jus-

tice the combination of qualities that eminently fitted him for the exalted position held by him as a member of the court.

That we remember with veneration his ability as a judge, his strong sense of justice, his firm administration of the law, his unsullied character and exalted virtues, and commend his life of study and labor in the profession as a worthy example for the younger members of the Bar.

That in his death we realize the loss of the companionship of a true man, an ornament to the Bench, and an honor to society and to our State, and extend to his family our earnest sympathy.

RESOLVED, That a copy of these resolutions be spread upon the minutes of this Court, and a copy be sent to the family of the deceased, and a copy be sent to each of the papers in Boise City for publication.

V. BIERBOWER.

GEO. AINSLIE.

W. T. REEVES.

Adopted at Boise, February 14, 1893.

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## In Memoriam.

IN THE MATTER OF THE RESOLUTIONS ON THE DEATH OF HON.  
NORMAN BUCK.

This day having been appointed by the court for the report of the committee heretofore named to prepare resolutions commemorative of the life and services of Hon. Norman Buck, the chairman of said committee, Mr. Eugene O'Neill, reported the resolutions prepared by the committee and read them to the court, and remarks thereupon were made by Messrs. J. W. Poe, Eugene O'Neill, James F. Babb, H. G. Redwine, William A. Hall, Justice Ailshie and Chief Justice Sullivan. Whereupon it was ordered that said resolutions be spread upon the records of this court, and that the clerk

transmit a certified copy of the same to the family of the deceased.

WHEREAS: Honorable Norman Buck, United States Attorney for Idaho Territory May 10, 1878, to January 27, 1880, and thence until in 1888 Judge of the First Judicial District and Associate Justice of the Supreme Court, afterward for four years Judge of the Superior Court of Spokane County, State of Washington, and a member of the House of Representatives, Eleventh Session, of the State of Washington, died on the 20th day of August, 1909.

NOW, THEREFORE, BE IT RESOLVED: That the Bench and Bar place on the records of this court this memorial of their loss in his departure, and of their sympathy for his widow and sons in their bereavement;

BE IT FURTHER RESOLVED: That we hereby record also an expression of our appreciation of the fidelity, honor and ability with which he discharged his duties as an attorney and a member of the Bench of this court; also, our interest in his varied and active career, beginning with graduation from Lawrence University in 1859, and including honorable service in the Civil War; as Probate Judge in the State of Minnesota; his service upon the Bench in laying the foundations of law and order and of property rights in mines and waters, and his interest and activity in public affairs, and in the causes of education and religion;

BE IT FURTHER RESOLVED: That the Clerk place these resolutions of record and furnish a copy thereof to Francena M. Buck, widow of deceased.

Respectfully submitted,

EUGENE O'NEILL,  
JAMES W. POE,  
JAMES E. BABB,  
Committee.

Adopted at Lewiston, September 10, 1909.

## In Memoriam.

### IN THE MATTER OF RESOLUTIONS CONCERNING THE DEATH OF HONORABLE JOHN T. MORGAN.

On this day the committee heretofore appointed by the court to prepare resolutions regarding the death of Honorable John T. Morgan appeared and presented its report through Hon. J. H. Hawley, chairman, and it was ordered that the report be adopted, spread upon the minutes of the court, and certified copies thereof sent to the family of the deceased.

Remarks were made concerning the character and services of the deceased by Hon. J. H. Hawley, O. E. Jackson, J. H. Richards, Edgar Wilson, Henry Johnson, Ira E. Barber, Judge F. S. Dietrich, and Chief Justice Isaac N. Sullivan. It was moved by O. E. Jackson that the resolutions as reported by the committee be embodied in the next volume of Idaho reports, which motion was by the court granted.

### TO THE SUPREME COURT OF THE STATE OF IDAHO:

Your Committee appointed to present resolutions expressing the estimate of the Bar of the State of the life and character of the late Judge John T. Morgan, and the deep sense of bereavement occasioned by his death, beg leave to report as follows:

The Bar of the Supreme Court of the State of Idaho, deploing the recent death of Honorable John T. Morgan, for many years a Justice of this Court, desire to place upon record a brief memorial of their esteem and admiration of his career and for his qualities as a man;

THEREFORE BE IT RESOLVED: That we, of the Bar of the Supreme Court of Idaho, are met together to pay tribute to the memory of an able lawyer, a man well versed in the learning of the books, and a Judge who never failed to uphold the dignity of the Bench. A pioneer of Idaho who had a large part in laying the legal foundations of our young

state upon which it must build for its future, he was unsparing of his strength in the legal work in which he was engaged; his judicial instincts were sound and visibly grew year by year; he possessed the breadth of comprehension that upheld the needs of our State, on which its future can securely rest, and thereby rendered great service to this commonwealth;

RESOLVED, That in the death of Honorable John T. Morgan, his friends have lost a kind and amiable companion, his profession a courageous, intelligent and honest brother, and the people of the State one of its greatest jurists.

RESOLVED, That these resolutions be spread upon the records of this court, and a certified copy thereof be furnished to the family of the deceased.

D. WORTH CLARK,  
F. S. DIETRICH,  
JAMES H. HAWLEY,  
J. H. RICHARDS,  
T. D. CAHALAN,

Committee.

Adopted at Boise, Idaho, September 20, 1910.



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### ACTIONS.

1. An action by a land owner within an irrigation district against the district for damages on account of failure to supply water to which he was entitled is an action in tort and not on contract. (Snake River Valley Irr. Dist. v. Stevens, 541.)

2. Under the provisions of sec. 3801, Rev. Codes, when the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. (State v. Wall, 300.)

See Pleading, 6, 7.

### ADMINISTRATORS.

See Executors and Administrators.

### ADVERSE POSSESSION.

1. Under the provisions of sec. 4043, Rev. Codes, to obtain title by adverse possession, the land is deemed to have been possessed and occupied in the following cases, only: "1. Where it has been protected by a substantial inclosure; 2. Where it has been usually cultivated or improved. *Provided, however,* That in no case shall adverse possession be considered established under the provisions of any sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law." (Brown v. Brown, 345.)

2. Where one seeks to procure title to another person's land under the rule of long acquiescence or adverse possession, he must establish his right by clear and satisfactory evidence. (Brown v. Brown, 345.)

### ANIMALS.

See Municipal Corporations, 17-19.

### APPEAL AND ERROR.

#### *Appeal Ends Jurisdiction of Trial Court.*

1. Where an appeal is taken from an order, the trial court has no jurisdiction to change or correct such order after the appeal therefrom has been taken, at least until the case is remanded and jurisdiction is again obtained. (Richardson v. Bohney, 328.)

(797).



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**APPEAL AND ERROR (Continued).*****Appeal to District Court.***

2. Under the provisions of sec. 1951, Rev. Codes, an appeal may be taken to the district court or a judge thereof, and such appeal may be tried either by the court or the judge. (*Village of Ilo v. Ramey*, 642.)

***Orders Appealable.***

3. Under the provisions of sec. 1950, Rev. Codes, an appeal may be taken from any act, order or proceeding of the board of county commissioners by any person aggrieved thereby or by any taxpayer of the county when he deems any such act, order or proceeding illegal or prejudicial to public interest. (*Village of Ilo v. Ramey*, 642.)

4. Whether the order involved in this case is an appealable order, *quaere*. (*Waters v. Dunn*, 450.)

***Notice of Appeal—Adverse Parties.***

5. Under the provisions of Rev. Codes, sec. 4808, an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney. (*Diamond Bank v. Van Meter*, 243.)

6. "Adverse party" as used in this section of the statute means every party who has an interest in conflict with the reversal of the judgment or whose rights might be adversely or injuriously affected by a reversal of such judgment, irrespective of whether such party be plaintiff, defendant or intervenor. (*Diamond Bank v. Van Meter*, 243.)

7. Where a joint judgment is rendered against two or more parties, and an appeal is taken by one of the parties against whom such joint judgment is rendered, then all other parties against whom such joint judgment has been rendered are adverse parties, and notice of appeal must be served upon each in order to give this court jurisdiction. (*Diamond Bank v. Van Meter*, 243.)

***Costs of Appeal—Stenographic Record.***

8. Under the provisions of sec. 3984, Rev. Codes, either party to a suit in which a stenographic record has been made may demand a typewritten copy of a part or the whole thereof, and the reporter must furnish the same upon the payment of a fee of seven and one-half cents per hundred words. (*Keane v. Pittsburg Lead Mining Co.*, 711.)

9. When a party procures a typewritten copy of the stenographic record to be used in the preparation of his bill of exceptions or statement of the case, and intends to have the cost thereof taxed as

**APPEAL AND ERROR (Continued).**

costs in the case on appeal, he must serve the copy of the stenographic record upon the adverse party when he serves his proposed bill or statement, so that the adverse party may have the benefit of it in preparing amendments or in ascertaining whether the proposed bill or statement is correct. (*Keane v. Pittsburg Lead Mining Co.*, 711.)

10. A transcript of such record in narrative form made by the reporter is not a compliance with said statute requiring the reporter to furnish a typewritten copy of the stenographic record, and the cost of procuring said record in narrative form will not be allowed as costs on appeal. (*Keane v. Pittsburg Lead Mining Co.*, 711.)

11. All fees earned by the reporter or his deputy under the provisions of the reporter statutes, which include section 3980 and the following seven sections, must be turned into the state treasury, and the reporter cannot evade that requirement by reducing the stenographic record to narrative form. (*Keane v. Pittsburg Lead Mining Co.*, 711.)

***Specification of Error.***

12. *Held*, that under the facts of this case the specifications of insufficiency of evidence to sustain the decision are sufficient to authorize and require the court to examine the evidence on appeal. (*Spongberg v. First National Bank*, 524.)

13. Where no exception is taken to the instruction of certain evidence and the admission thereof is not specified as error in the assignment of errors in appellant's brief, the admissibility of such evidence will not be passed upon on appeal. (*State v. Harris*, 620.)

***Transcripts.***

14. It is the duty of counsel to have their transcripts on appeal printed in accordance with the rules of the court. (*Richardson v. Bohnney*, 328.)

14a. Under the provisions of Rule 25 of the rules of this court, the time during which the trial court or judge holds a bill of exceptions or statement prior to the settlement and filing thereof and the time during which the attorney for the respondent may retain the transcript on appeal before certifying or refusing to certify the same, must be excluded in computing the sixty days' time in which a transcript is required to be filed. (*Featherstone v. Keane*, 24.)

***Bills of Exceptions and Statements.***

15. After an order refusing to settle a bill of exceptions has been appealed from, it is then too late for the trial court to amend such order, as it loses jurisdiction in the matter when the appeal is taken. In such case a motion to substitute an amended order for the original will be denied. (*Richardson v. Bohnney*, 328.)

**APPEAL AND ERROR (Continued).**

16. The preparation and settlement of a statement or bill of exceptions is a proceeding within the meaning of the term "proceeding" as used in sec. 4229, Rev. Codes. (Richardson v. Bohney, 328.)

17. Where application is made to the court to settle a bill of exceptions after the time has expired for serving the same, on the ground of mistake, inadvertence or excusable neglect, and the court finds that the bill was not served in time by reason of mistake, inadvertence, surprise or excusable neglect, it is the duty of the court to grant relief from such default. (Richardson v. Bohney, 328.)

18. Under the provisions of subd. 2, sec. 4556, Rev. Codes, all bills of exceptions settled and filed prior to the rendition of judgment become a part of the judgment-roll, and on an appeal from the judgment, under the provisions of sec. 4818, Rev. Codes, become a part of the transcript. However, where a bill of exceptions is a part of the judgment-roll and not relied upon on the appeal, it may be omitted from the transcript by stipulation of counsel, but will not be stricken from the transcript on motion of respondent. (Fouch v. Bates, 374.)

19. Where a proposed statement is not presented and settled within the time required by law and is inserted in the transcript, on motion, it will be stricken therefrom. (Featherstone v. Keane, 24.)

**Questions of Evidence.**

20. Where the trial court has heard and determined a case solely on depositions and documentary evidence, and an appeal is taken from the judgment on the ground that it is not supported by the evidence, the appellate court will examine and weigh the evidence the same as if the case were being tried *de novo*. (Spofford v. Spofford, 115.)

21. Where there is a substantial conflict in the evidence, the decision of the trial court will not be reversed. (Tomsche v. Hummel, 23.)

22. Where there is a substantial conflict in the evidence upon which any finding of fact is based, such finding will not be reversed on appeal. (Flynn Group Mining Co. v. Murphy, 266.)

23. Where there is a substantial conflict in the evidence the findings of the trial court will not be set aside. (Western Moline Plow Co. v. Caldwell, 463.)

See Injunction, 7-9; Receivers.

## ATTACHMENT.

1. Under the provisions of secs. 4302 and 4303, Rev. Codes, an attachment may be had against a defendant not residing in this state in an action upon a judgment or upon a contract express or implied, and in such case it is not necessary to show by the affidavit for attachment that the plaintiff has no security for the debt. (*Foore v. Simon Piano Co.*, 167.)

2. Where constructive service of summons has been had by publication against a nonresident defendant and property within the state has been attached under a writ of attachment regularly issued in conformity with the requirements of the statute, the jurisdiction of the court attaches *in rem* to the extent of the property attached, and a judgment entered under the constructive service of summons is valid and binding to the extent of the *rem*. (*Foore v. Simon Piano Co.*, 167.)

3. The notice of the issuance of a writ of attachment required to be given by the clerk under the provisions of sec. 4304, Rev. Codes, is intended for the protection and benefit of other creditors of the defendant, and a failure to give notice is not available to the defendant in the attachment proceeding, and does not enable him to avoid the attachment or subsequent execution sale thereunder. (*Foore v. Simon Piano Co.*, 167.)

4. The question as to whether or not an excessive levy has been made under a writ of attachment is one to be presented to the court from which the writ issued and in which the action is pending, and cannot be raised by the defendant after an execution sale and in a collateral or independent action. (*Foore v. Simon Piano Co.*, 167.)

## ATTORNEY FEES.

See Bills and Notes, 6, 7; Mortgages, 1-4; Usury, 2.

## BAILMENT.

*In General.*

1. A bailee who receives property as a deposit for safekeeping is bound to deliver it to the bailor upon demand, unless he has a lien on it, or is prevented from so doing by the real owner or act of law. (*Bates v. Capital State Bank*, 429.)

2. In an action against a depositary, the burden is on the depositor to prove the bailment and failure or refusal to return the property on demand. If that is shown, it then becomes incumbent upon the depositary to return the same or show sufficient circumstances or facts that would excuse him in law for refusing. (*Bates v. Capital State Bank*, 429.)

3. A "deposit" is a naked bailment of goods to be kept for the depositor without reward and to be returned when he shall demand it. (*Bates v. Capital State Bank*, 429.)

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**BAILMENT (Continued).***Deposit With Bank—Limitation of Actions.*

4. Where a bank or banker receives property upon deposit, there results an implied contract that he will return it to the depositor upon demand. (*Bates v. Capital State Bank*, 429.)

5. Under the provisions of sec. 4059, Rev. Codes, where an action is brought to recover money or property deposited with a bank or banker, the statute of limitations does not begin to run until after demand by the depositor. (*Bates v. Capital State Bank*, 429.)

**BALLOTS.**

See Elections.

**BANKS AND BANKING.***National Bank—Powers of Cashier.*

1. In contemplation of law, the leasing of property belonging to a national banking association is not within the ordinary powers and duties of the cashier of the bank. (*Spongberg v. First National Bank*, 524.)

2. Where the cashier of a national bank has entered into a contract to lease certain of the bank property for a term of years and it does not appear that he had any express authority from the board of directors to do so, but it does appear that the contract signed by the cashier and the lessee has been in possession of the bank for eighteen months, and that at least a majority of the directors of the bank had knowledge of the contract and its terms and conditions, and that the cashier was exercising the power and authority of leasing the bank property, and especially vacant rooms in the bank building, and that the bank's building committee or its board of directors made changes in the plans and specifications of its building on the suggestion of the lessee and incorporated the same in the building as erected, and finished the room to be occupied by the lessee in accordance with his request and suggestions, and the board of directors never repudiated the contract or notified the lessee that they would not live up to the same until after the expiration of eighteen months and the completion of the building, *held*, that such acts and conduct on the part of the board of directors amounted to a ratification of the action of the cashier and rendered the contract entered into by him the contract of the bank. (*Spongberg v. First National Bank*, 524.)

See Bailment; Taxation, 3-6.

**BENEFIT SOCIETY.**

See Insurance.

## BILLS AND NOTES.

*Failure of Consideration.*

1. The maker of a promissory note cannot avoid payment of the same on the grounds of failure of consideration, where the answer and proofs admit that there was not a total failure of consideration and that he in fact received and retains a part of the consideration as the same was agreed upon. (*Daniels v. Englehart*, 548.)

2. Where there has been a partial failure of consideration for the execution of a promissory note, the maker of the note, in order to obtain relief, must either rescind the contract and return the consideration received or claim damages for breach of the contract or pursue some remedy whereby the holder of the note may be enabled to receive just compensation for such part of the consideration as actually passed. (*Daniels v. Englehart*, 548.)

*Construction of Mortgage Notes.*

3. Where the provisions of a promissory note, secured by mortgage, vary from the terms of the mortgage, the provisions of the note must control. (*Tipton v. Ellsworth*, 207.)

4. Held, that Mrs. Ellsworth is one of the principals upon the promissory notes involved in this case and not a surety. (*Tipton v. Ellsworth*, 207.)

*Maturity—Interest.*

5. Where it is stipulated in a promissory note that "the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of the note" if payment of interest and principal instalments are not made when due, such stipulation is a penalty, and will not be enforced as to the interest not yet earned on the principal. (*Tipton v. Ellsworth*, 207.)

*Stipulation for Exchange and Attorney Fees.*

6. Held, under the facts of this case that the stipulation for attorneys' fees or legal services was in regard to the collection of collateral notes, and did not contemplate attorneys' fees for the collection of the principal note. (*Chase National Bank of New York v. Meholin*, 308.)

7. Where it is stipulated in a promissory note that a debt shall be paid at the residence of the payee and that the payer shall also pay exchange charges, and the payee thereafter receives and accepts the payment at the residence of the payer, he thereby waives exchange charges and cannot thereafter recover such charges. (*Chase National Bank of New York v. Meholin*, 308.)

See Executors and Administrators, 8, 9; Guaranty; Usury.

**BILL OF EXCEPTIONS.**

See Appeal and Error, 15-19.

**BONDS.**

See Municipal Corporations, 20-24.

**BOUNDARIES.**

1. Acquiescence in the maintenance of a line fence for a great length of time may be presumptive evidence of an agreement as to a boundary line, but is not conclusive evidence, and will not overcome a positive agreement or understanding that after the true line is established, the fence will be made to conform to it. (*Brown v. Brown*, 345.)

2. *Held*, that the evidence in this case is not sufficient to support the findings of fact to the effect that the division line fence has been regarded by all of the parties concerned or interested in said boundary line as the true and correct boundary line and acquiesced in as the true and correct boundary line. (*Brown v. Brown*, 345.)

3. *Held*, that the facts of this case do not bring it within the rule laid down in the case of *Bayhouse v. Urquides*, 17 Ida. 286, 105 Pac. 1066. (*Brown v. Brown*, 345.)

**BRIDGES.**

See Highways.

**BUILDING CONTRACTS.**

See Contracts.

**BURGLARY.**

The evidence *held* sufficient to support the verdict. (*State v. Harris*, 620.)

**CARRIERS.**

See Railroads.

**CERTIORARI.**

1. A writ of review brings up the record of the tribunal, board or body whose acts are to be examined, and is issued for the purpose of reviewing the law applicable to the case, instead of examining the facts of the case, except in so far as an examination of the facts is necessary in the determination of the single question of jurisdiction. The purpose of the review is to determine primarily the law applicable to the case rather than the facts of the case. (*Lansdon v. State Board of Canvassers*, 596.)

2. It is the nature of the act to be performed rather than of the office, board or body which performs the act that determines

**CERTIORARI (Continued).**

whether or not it is the discharge of a judicial or quasi-judicial function. (*Lansdon v. State Board of Canvassers*, 596.)

**COMMON LAW.**

See Evidence, 7, 8.

**COMPROMISE AND SETTLEMENT.**

1. Evidence examined and *held* to support the verdict of the jury. (*Heath v. Potlatch Lumber Co.*, 42.)

2. Whether an assistant general manager of a lumber company, in charge of the operation of the company's plant, has authority to make a contract with an injured employee in compromise of damages claimed by such employee, is immaterial if such company ratifies the acts of the assistant general manager in making such compromise agreement, and makes payments in accordance with the terms thereof. (*Heath v. Potlatch Lumber Co.*, 42.)

3. Where a claim is made against another in good faith, and the latter denies its liability, and to avoid a lawsuit agrees to pay such claim in consideration that suit will not be brought upon such claim, there is a sufficient consideration to support such compromise agreement. (*Heath v. Potlatch Lumber Co.*, 42.)

4. There is sufficient consideration to support a compromise agreement if the claim is made in good faith and is disputed, and in consideration that the claimant forbears to sue in respect to such claim, a promise is made to pay a certain sum of money, and such promise may be enforced in an action at law. (*Heath v. Potlatch Lumber Co.*, 42.)

5. Where a check is given as a partial payment in accordance with a compromise agreement, the fact that the person giving such check incorporates therein language releasing the payor for all claims and damages, will not operate to release the promisor from complying with the compromise agreement, unless it clearly appears that it was the intention of both parties that such check should be in full payment of all claims and demands whatsoever. (*Heath v. Potlatch Lumber Co.*, 42.)

**CONSPIRACY.**

1. Where a conspiracy existed between defendant and his wife for the purpose generally of procuring girls to have sexual intercourse with defendant, a statement or declaration made by the wife subsequent to the commission of a specific act, and during the existence of the common design, is admissible against the defendant as a declaration from a co-conspirator. (*State v. Hammock*, 424.)

2. Evidence of the common purpose to commit like crimes on other girls and the commission of such offenses by the defendant



**CONSPIRACY (Continued).**

*held* admissible under the circumstances of this case, as incidents in the commission of the common criminal design included in the conspiracy. (*State v. Hammock*, 424.)

3. Alleged errors in the admission and rejection of evidence examined, and *held*, that no substantial right of defendant has been prejudiced by the rulings of the court. (*State v. Hammock*, 424.)

**CONSTITUTIONAL LAW.***In General.*

1. It is the law in this state that if the provisions of an act are connected in subject matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other, then if one part falls, the entire act must fall. (*Cunningham v. Thompson*, 149.)

2. That which the constitution directly prohibits may not be done by indirection or by a general legislative act which is meant and intended to include and accomplish the purposes and objects specifically or impliedly prohibited. (*Atkinson v. Board of Commrs.*, 282.)

*Special and General Laws.*

3. A special law is one that applies only to a special locality or to an individual or to a number of individuals selected out of a class to which they belong. (*Mix v. Board of County Commrs.*, 643.)

4. A general law is one framed in general terms, restricted to no locality and operating upon all alike. (*Mix v. Board of County Commrs.*, 695.)

See Elections; License Taxes; Railroads; Sunday Law; Taxation, 7-9.

**CONTINUANCE.**

1. An application for a continuance is addressed to the sound legal discretion of the court, and the decision of the court or judge thereof will not be reversed unless there is a clear abuse of discretion. (*Miller v. Brown*, 200.)

2. *Held*, under the facts of this case that the motion for a continuance was properly denied. (*Miller v. Brown*, 200.)

3. A party is not entitled to a continuance without showing due diligence and the use of legal means to procure the desired evidence, or a clear and sufficient excuse for not resorting to such legal means. A bare request to furnish the evidence is in no sense a compliance with the requirements of the law. (*Walsh v. Winston Bros. Co.*, 768.)

See Justice of Peace.

## CONTRACTS.

*Building Contracts.*

1. Where S. subscribes his name to a contract executed by B. and K., and no mention of S.'s name appears in the body of the contract and no reference to his liability is made in the contract, *held*, that S. signed as surety and should be held as such. (*Sanders v. Keller*, 590.)

2. Where a building contract was indefinite or uncertain in certain particulars and the principal obligor placed his own construction and interpretation on the contract and erected the building in accordance therewith, and there does not appear to have been any fraud or collusion between the contractor and the owner of the building, *held*, that the surety will be bound by the construction placed on the contract by his principal. (*Sanders v. Keller*, 590.)

*Breach of Contract.*

3. Where one party to a contract voluntarily places himself in a position whereby he is unable to carry out the provisions of his contract, he is as liable for a breach thereof as though he had deliberately refused to comply with its provisions. (*Bell v. Shields*, 649.)

See *Telegraph Companies*.

## CORPORATIONS.

*Contract of Employment.*

1. Where D. entered into a contract with a corporation whereby it was mutually understood and agreed that in consideration of D. purchasing stock in the corporation and retaining and continuing his ownership in such stock of the corporation, the corporation would furnish him employment as assistant general manager as long as D. retained the ownership of such stock, at the same salary that the corporation might or should from time to time pay to one W., its general manager, and D. entered into the employment of the corporation under such contract and continued in the service of the company for about three years, and thereafter sued the corporation to recover his wages at the agreed and stipulated price, the corporation will be bound to pay such salary as was agreed and stipulated, and will be estopped from setting up the plea of *ultra vires*. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

2. In such case, where the services have already been rendered and the action is one merely to collect the salary already earned, the question as to the power of the corporation to repudiate the contract and discharge the employee does not arise and is not involved. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

*Pleading Corporate Existence.*

3. Where a complaint against a corporation alleges "that on the 10th day of October, 1907, the plaintiff and Village Blacksmith Min-

## CORPORATIONS (Continued).

ing Co., a corporation, through its board of directors as officers and acting for said defendant, entered into a contract with said plaintiff," etc., and in another allegation of the complaint refers to the defendant as "a corporation," *held*, that the allegation of the corporate existence of the defendant is sufficient to withstand the assault of a general demurrer. (*Fegtly v. Village Blacksmith Mining Co.*, 536.)

4. *Miller v. Pine Mining Co.*, 3 Ida. 495, 35 Am. St. 289, 31 Pac. 803, distinguished, and question considered but not decided as to whether or not that case expresses the correct rule of law. (*Fegtly v. Village Blacksmith Mining Co.*, 536.)

*Foreign Corporations.*

5. The provisions of sec. 10, art. 11, of the state constitution and of sec. 2792, Rev. Codes, prohibiting a foreign corporation "doing business in this state" without first filing its articles of incorporation and designating an agent, do not apply to a foreign corporation doing interstate business or a corporation that sells an article in another state to a citizen of this state and which thereafter finds it necessary to resort to the courts of this state for the collection of the debt. (*Foore v. Simon Piano Co.*, 167.)

6. Sec. 2792, Rev. Codes, which prohibits a non-complying foreign corporation from taking title to realty within this state prior to filing its articles, does not apply to a foreign corporation which bids in real estate at execution sale for the collection of a judgment due to the corporation, and which judgment arises out of an interstate transaction. (*Foore v. Simon Piano Co.*, 167.)

7. The prosecution of an action in this state for the collection of a debt contracted in another state, and payable in that state, does not constitute "doing business" in this state within the meaning of the constitution (sec. 10, art. 11) and the statute (sec. 2792, Rev. Codes). (*Bonham Nat. Bank v. Grimes Pass etc. Co.*, 629.)

8. Where a foreign corporation commences an action in this state and discloses upon the face of its pleading that it is a foreign corporation, it must then either show a compliance with the state laws entitling it to do business within the state or else show by the facts constituting its cause of action that the contract sued upon does not arise out of a domestic transaction or by reason of doing any business within this state. If, therefore, the contract sued upon shows upon its face that it is a foreign contract, and that it did not arise out of domestic business or a domestic transaction, the complaint will not be demurrable on account of the failure of the plaintiff to show compliance with the foreign corporation laws of this state. (*Bonham Nat. Bank v. Grimes Pass etc. Co.*, 629.)

See Banks and Banking; Compromise and Settlement.

## COSTS.

See Appeal and Error, 8-11; Eminent Domain, 1-4.

## COUNTIES.

Where a county is enlarged by annexing a portion of another county, the annexed portion is liable to pay its proportionate share of the indebtedness of the county to which it is annexed. (Blake v. Jacks, 70.)

See Highways.

## COUNTY COMMISSIONERS.

See Appeal and Error, 3.

## CRIMINAL LAW.

*Selling by Short Weight.*

1. In a prosecution for unlawfully selling lard by short weight a verdict by the jury in the following form: "We, the jury in the above-entitled case, find the defendant, George Schweitzer, guilty of selling by short weights as charged in the complaint," is sufficiently definite and certain as to the intent of the jury to "find the defendant guilty as charged in the complaint" to justify and support a judgment of conviction. (State v. Schweitzer, 609.)

2. Where M. went to a butcher-shop and told the manager thereof that he wanted to buy "a three-pound pail of lard" and he was given a pail of lard commonly known and designated as a three-pound pail, for which he paid the price demanded, and upon weighing the same it appeared that the bucket and lard together weighed the gross sum of three pounds and three-fourths of an ounce, and that the net weight of the lard contained in the bucket was two pounds and nine and one-half ounces, and the vendor of the lard is subsequently prosecuted under the provisions of sec. 7109 of the Rev. Codes, for selling by short weight, it is a question to be submitted to the jury as to whether or not the purchaser offered to buy and the seller represented that he was selling three pounds of lard net or gross, and it was error for the court to instruct the jury that when the purchaser asked for a three-pound pail of lard "he must be taken to have meant, and the defendant must be taken to have understood, that the purchaser was to receive three pounds of lard irrespective of the weight of the pail." (State v. Schweitzer, 609.)

*Sentence and Judgment.*

3. Under the provisions of sec. 8 of the act known as the Indeterminate Sentence Law, approved March 11, 1909 (Sess. Laws 1909, p. 81), a person convicted of a felony committed prior to the taking effect of that act and sentenced after the act was in force, must be

## CRIMINAL LAW (Continued).

sentenced under the law in force at the time such felony was committed. (In re Chase, 561.)

4. *Held*, that the petitioner should have been sentenced under the provisions of sec. 6768, Rev. Codes, by which the minimum sentence was fixed at five years and the maximum extended to life. (In re Chase, 561.)

5. *Held*, that the sentence imposed is not void *ab initio*, but is valid and certain as to the term of five years' imprisonment, and that the prisoner cannot be discharged on *habeas corpus* until he has performed so much of the sentence as was within the power of the court to impose. (In re Chase, 561.)

6. *Ex parte Cox*, 3 Ida. 530, 95 Am. St. 29, 32 Pac. 197, commented on and distinguished. (In re Chase, 561.)

*Prosecution, Trial, and Evidence.*

7. Sec. 1 of art. 5 of the constitution, which authorizes prosecutions in the name of the people, is not violated by sec. 7353, Rev. Codes, which directs that criminal actions shall be prosecuted in the name of the "State of Idaho" as a party plaintiff, and a prosecution by "State of Idaho" as plaintiff is in conformity with the constitution and the statute. (State v. Lockhart, 730.)

8. In a prosecution for homicide, it was error for the court to permit the state to introduce in evidence a card showing the membership of the deceased in a particular organization of which a majority of the jurors were members, where the only reason for introducing the card was that it tended to establish the name of the deceased. (State v. Lockhart, 730.)

9. Where during the course of the prosecutor's statement to the jury before the introduction of evidence the defendant asks that the witnesses be excluded, it is proper and advisable that the order of exclusion be made and the witnesses be excluded prior to the statement of the case by the prosecutor. (State v. Lockhart, 730.)

See Homicide.

## DEEDS.

*Delivery.*

1. *Held*, that a return of a deed by the grantor to the grantee, under the facts of this case, leaves the legal title to the real estate described in the deed in the grantor. (Fouch v. Bates, 374.)

*Rule in Shelley's Case.*

2. Under the provisions of sec. 3076 of the Rev. Codes, the common-law rule, generally known as the "Rule in Shelley's Case," has been abrogated, and the term "heirs" has been changed from a word of limitation to one of purchase. (Wilson v. Linder, 438.)

See Boundaries; Vendor and Vendea.

## DEFAULT JUDGMENT.

See Judgment, 2, 3.

## DEPOSITS.

See Bailment.

## DISTRICT COURT.

See Appeal and Error, 2.

## DIVORCE.

1. Where a decree of divorce is asked by the husband on the grounds of cruelty by the wife, and such cruelty is alleged to have consisted in the wife's hostile demonstrations and lecturing, nagging and hectoring the husband on account of what she deemed to be undue attentions and intimate relations on the part of the husband toward other women, and the evidence discloses that he had been so indiscreet in his conduct toward others as to arouse suspicion on the part of his wife, the conduct of the wife in her protests and outbursts of feeling will not be viewed with the same severity and rigidity by the law as it would be in a case where no such apparent provocation existed. (*Spofford v. Spofford*, 115.)

2. The party to the marital contract who by his acts and conduct induces suspicion from the other spouse and thereby provokes remonstrance, protests and hostile demonstrations from the other party to the contract, must expect when the crisis comes to exercise a degree of patience and forbearance which the law would not otherwise expect of him under more favorable circumstances. (*Spofford v. Spofford*, 115.)

3. Evidence in this case examined, weighed and considered, and held not sufficient to justify the granting of a divorce. (*Spofford v. Spofford*, 115.)

## DOMICILE.

If a person has established an actual residence in a town or village, his temporary absence therefrom would not forfeit such residence. (*Village of Ilo v. Ramey*, 642.)

## EASEMENTS.

A legal distinction exists and should be maintained between the absolute fee, title and ownership of property itself and those contractual rights which arise out of mutual consent and give a contracting party certain claims, easements or servitudes in and to the property, and which by their very nature impress themselves upon the property itself, either for a time or perpetually. (*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 1.)

## ELECTIONS.

*Primary Election Law.*

1. That provision of section 14 of an act entitled, "An act relating to and providing for the nomination of candidates of political parties," etc., and commonly known as the primary election law (Sess. Laws 1909, p. 196), which requires a voter to vote for both first and second choice if there are more than twice as many candidates as there are positions or offices to be filled, is not in conflict with sec. 19, art. 1, of the constitution, which provides that "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." (Adams v. Lansdon, 483.)

2. Sec. 19, art. 1, of the constitution has reference to the attendance of officers, civil or military, at the polls, and prohibits them from interfering with the free and lawful exercise of the right of suffrage. (Adams v. Lansdon, 483.)

3. By the provisions of said act, the legislative intent was to take the nomination of the officers therein named away from party committees or party conventions and have them nominated by the legal voters of the several political parties by a majority of the first-choice votes if possible, and in case no candidate receives a majority of first-choice votes, then by a plurality of first and second choice votes added together. (Adams v. Lansdon, 483.)

4. That provision of sec. 14 of said act which reads as follows: "Vote for both first and second choice if there are more than twice as many candidates as there are positions," is mandatory. (Adams v. Lansdon, 483.)

5. The failure to vote for both a first and second choice will not avoid the ballot except as to the particular office where both a first and second choice vote is required and for which the voter has failed to express both a first and second choice. (Adams v. Lansdon, 483.)

6. The provisions of the primary election law in regard to personal expenditures of candidates to aid or promote their nomination are not repugnant to the provisions of sec. 9, art. 1, constitution of Idaho, which declares that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." (Adams v. Lansdon, 483.)

7. The intent and purpose of said primary election law is to prevent large expenditures of money, property or promises to aid or promote the nomination of any person. (Adams v. Lansdon, 483.)

8. Precinct officers may, under the provisions of sec. 29 of said act, be nominated in any reasonable way provided by a party committee or organization. (Adams v. Lansdon, 483.)

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**ELECTIONS (Continued).*****Primary Law—Expense of Candidates.***

9. All of the provisions of said act in regard to the nomination of a candidate by payment of a fee or by petition and also the provisions in regard to personal expenses must be construed together, and the candidate is prohibited from expending for all such purposes more than fifteen per cent of the yearly salary of the office he is seeking. (Adams v. Lansdon, 483.)

10. A person is a candidate for nomination within the intent of the primary election law when he is expending his money in employing and sending out workers or perfecting an organization, or advertising and exploiting himself, or influencing public opinion in his favor or against an opponent, or in numerous other ways that present themselves to the office-seeker for the purpose of increasing and enhancing his ultimate chances of nomination for a given office or to aid or promote such nomination. (Adams v. Lansdon, 483.)

10a. Under the direct primary law the *purpose* of the expenditure by a candidate is the test of its lawfulness without reference to the time at which it was made. (Adams v. Lansdon, 483.)

11. Under the provisions of sec. 24 of said law, a candidate for nomination is prohibited from expending for "personal expenses" as the same is defined by said section, "or at all," to aid or promote his nomination, more than fifteen per cent of the yearly compensation or salary attached to the office which he seeks. (Adams v. Lansdon, 483.)

***Contest of Nomination for Governor.***

11a. Under the direct primary nomination law of this state, there is no provision for the contest of the nomination of a candidate for the office of governor. (Lansdon v. State Board of Canvassers, 596.)

***Right of Candidate to have Name Printed on Ballot.***

12. Where a candidate for nomination under the direct primary nomination statute of this state has been duly and regularly certified by the canvassing board to the county auditor as having received the nomination of his party for a county office, the duty of causing the name of such nominee to be printed on the official ballot to be used at the succeeding general election is purely a ministerial act, and the auditor cannot sit in judgment on the candidate and adjudge him ineligible to have his name printed on the ticket on account of his failure to file an expense account either within the time or in the manner provided by the direct primary law. (Secs. 25 and 26, 1909 Sess. Laws, p. 204.) (Fuller v. Corey, 558.)

13. Before a nominee under the direct primary law can be denied the right to have his name printed on the official ballot on ac-



**ELECTIONS (Continued).**

count of ineligibility resulting from his failure to file a statement of his expense account either within the time or in the manner provided by law, he must be judicially declared, by orderly and due process of law, to be ineligible on account of his violation of the direct primary law. (*Fuller v. Corey*, 558.)

***Right to Vote and Hold Office.***

14. The right to vote and hold office is not one of the inalienable rights of the citizen; the regulation of that privilege conferred on the citizen has been delegated to the political department of the state government, and will not be controlled or interfered with by the courts, except in so far as the law-making power has provided a remedy that may be pursued in the courts, or in cases where the law commands action and election officers or boards refuse to act, or where such officers or boards attempt to act in a manner contrary to or violative of the statute. (*Lansdon v. State Board of Canvassers*, 596.)

***Ballots—Numbering—Distinguishing Marks.***

15. Sec. 1, art. 6, of the constitution provides that, "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect." (*McGrane v. County of Nez Perce*, 714.)

16. Under the provisions of sec. 1, art. 6, of the state constitution, it would not be within the power of the legislature to authorize and direct the numbering of ballots to be used at an election. (*McGrane v. County of Nez Perce*, 714.)

17. Under the provisions of sec. 408, Rev. Codes, "No ballot must be used or counted at any election except the legal ballot printed by the county auditor . . . and distributed according to law by the distributing clerk within the polling-place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof, whereby it might be distinguished from any other ballot legally used on the same day." (*McGrane v. County of Nez Perce*, 714.)

18. Where an auditor of a county furnished ballots to the election officers of the several precincts of his county, and the ballots so furnished had been numbered consecutively from 1 to 15,000, and the number contained on each ballot corresponded with the number on the stub to that ballot, and the error, mistake, or wrongful act in numbering the ballots was not known to the electors, and the same was done without their knowledge or consent, and no opportunity was presented to the electors for having the error corrected,

**ELECTIONS (Continued).**

and the election was held by using such ballots in the several precincts of the county, the election will not be held void, either upon the ground that the numbering was an invasion of the constitutional secrecy of the ballot guaranteed to the people, nor upon the ground that the ballots contained distinguishing marks. (*McGrane v. County of Nez Perce*, 714.)

19. The prohibition contained in sec. 408, Rev. Codes, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties, but the statute nowhere prescribes that the penalty for violating this duty or a failure to faithfully discharge it shall be visited upon the electors or avoid the election. (*McGrane v. County of Nez Perce*, 714.)

20. To hold that the numbering of ballots by the election officers, who are charged with the preparation and distribution of election supplies and ballots, has the effect of rendering an election void, would place it within the power of the officers to disfranchise the entire electorate of their county, and prevent the holding of a valid and legal election, and would turn this statute safeguarding the elective franchise into an instrument of injustice and disfranchisement. (*McGrane v. County of Nez Perce*, 714.)

21. The purpose of the constitutional guaranty of "an absolutely secret ballot" and the statutory provisions against "distinguishing" marks on ballots is not so much to prevent marks and characters on ballots whereby it would be possible to distinguish the ballot of a particular elector, as it is the aim to prevent fraud, corruption, intimidation and oppression in elections and to so guard and hedge about the individual elector that he may vote his individual, conscientious and deliberate judgment without fear of anyone calling him to account therefor, and to prevent the corrupt voter from selling his vote and furnishing to the purchaser satisfactory visual evidence of the casting of the vote in accordance with the contract. (*McGrane v. County of Nez Perce*, 714.)

**Board of Canvassers—Returns.**

22. The state board of canvassers in canvassing election returns sent up by the boards of canvassers of the several counties and computing the total vote received by each candidate and certifying to the secretary of state the names of the persons who received the majority or plurality, as the case may be, of all votes cast for each respective office, is discharging a ministerial duty rather than a judicial function. Mathematical computation and cal-

**ELECTIONS (Continued).**

ulation does not constitute the exercise of judicial functions. (*Lansdon v. State Board of Canvassers*, 596.)

23. The fact that the state board of canvassers on receiving returns from the boards of canvassers of the several counties did not consider such returns inaccurate, uncertain, or as showing on their face omissions or errors, and their consequent neglect or refusal to send the same back to the county boards of canvassers for correction, does not constitute an excess of jurisdiction, nor does it oust the board of the jurisdiction acquired to canvass returns and declare the results. (*Lansdon v. State Board of Canvassers*, 596.)

24. It is not the business or duty of the state board of canvassers to determine whether or not any illegal votes have been cast or legal votes rejected; they have no way to know whether more votes have been counted than were actually cast or that the count has been made in every instance correctly by the various election officers or canvassing boards. The duty of the state board of canvassers is that of casting up the returns and declaring and certifying the result as shown by the returns. (*Lansdon v. State Board of Canvassers*, 596.)

25. *Green v. State Board of Canvassers*, 5 Ida. 130, 95 Am. St. 169, 47 Pac. 259, considered and distinguished. (*Lansdon v. State Board of Canvassers*, 596.)

***Injunction Against Canvassing Board.***

26. Where an appeal is taken from an order denying an application for a temporary restraining order, made upon the complaint alone, without notice to the adverse party, to restrain a canvassing board from canvassing the vote of a certain precinct in a county, and a motion is made to dismiss the appeal based upon the affidavit of the clerk of the canvassing board, showing that such board had canvassed and certified the abstract of votes of such county and precinct prior to the taking of the appeal, the motion will be granted and the appeal dismissed. (*Roberts v. Kartzke*, 552.)

**EMINENT DOMAIN.*****Condemnation Proceedings—Dismissal—Damages—Costs.***

1. Sec. 5228 of the Revised Codes, which is a part of the title on eminent domain, makes the general provisions of the Code relative to "civil actions" applicable to proceedings under the eminent domain title, except as otherwise specially provided; and sec. 4354 of the Rev. Codes dealing with actions generally, provides that, "An action may be dismissed or a judgment of nonsuit entered . . . by the plaintiff himself, at any time before trial, upon the payment of costs: Provided, a counterclaim has not been made or affirmative re-

**EMINENT DOMAIN (Continued).**

lief sought by the cross-complaint or answer of defendant"; *held*, that the latter section is applicable to actions and proceedings in eminent domain and authorizes the plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award the damages or at any time before trial. (Chicago etc. Ry. Co. v. Trueman, 687.)

2. A dismissal of an action as authorized by subd. 1 of sec. 4354, Rev. Codes, "is made by an entry in the clerk's register." (Chicago etc. Ry. Co. v. Trueman, 687.)

3. By the provisions of sec. 5227, Rev. Codes, costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court"; *held*, that where a plaintiff commences an action in condemnation and procures the appointment of commissioners and has a hearing, and the commissioners make an award and file their findings and report, and the plaintiff refuses to pay the award and thereafter dismisses the action, all costs usually taxed in civil actions should be taxed against the plaintiff, and that it would be an abuse of discretion not to do so under such circumstances, and that the provisions of the general statute relative to costs in "civil actions" would apply in such case. (Chicago etc. Ry. Co. v. Trueman, 687.)

4. Where a plaintiff in condemnation has, subsequent to the filing of the report of the commissioners appointed to assess the damages, dismissed the action under the provisions of subd. 1, sec. 4354, the defendants must file their memorandum of costs within five days after notice of the dismissal as provided by sec. 4912 of the Rev. Codes. (Chicago etc. Ry. Co. v. Trueman, 687.)

***Assessment and Payment of Damages—Trial by Jury.***

5. A corporation armed by the constitution and statutes of this state with the power of eminent domain has no right to enter upon and take possession of the premises sought to be condemned until it either pays to the owner of the property the amount assessed and found as damages by commissioners duly appointed, or, in case the owner refuses to accept the award, has paid the same to the clerk of the court to abide the result of the action. (Pyle v. Woods, 674.)

6. Where the parties to a condemnation proceeding are unable to agree in the first place upon the value of the property and the damages that will be sustained, if the damages are subsequently assessed by commissioners appointed in conformity with the statute (sec. 5226), and the plaintiff voluntarily pays the award to the defendant or into court to abide the result of the action, and the defendant voluntarily receives and accepts such award, the payment

**EMINENT DOMAIN (Continued).**

thus made by the party plaintiff and received and accepted by the party defendant constitutes a contract or voluntary agreement between the parties, and terminates the proceeding and entitles the plaintiff to its decree in condemnation. (*Pyle v. Woods*, 674.)

7. Where a plaintiff in condemnation has procured the appointment of commissioners to assess the damages that would be sustained by the property owner, and has thereafter voluntarily paid the award to the defendant or to the clerk of the court and taken possession of the premises sought to be condemned, such plaintiff is not thereafter, on its own motion, entitled to have the question of damages and compensation submitted to a jury, and the court has no jurisdiction to do so over the objection and protests of the defendant who is ready and willing to accept the award as full compensation for the damages he will sustain by reason of the condemnation. (*Pyle v. Woods*, 674.)

8. In a proceeding under the statute in condemnation, primarily, the right of trial by jury is accorded equally to both parties to the action. As a substitute therefor, there is accorded to the plaintiff the right of having commissioners appointed to assess the damages that will be sustained by the defendant, and if the plaintiff pays such award and the defendant accepts the same, the right of trial by jury is ended. If, on the other hand, the plaintiff pays the award and the defendant refuses to accept it, the plaintiff may no longer demand a jury, but the defendant may still demand a jury to assess the damages that he will sustain. If, however, the defendant accepts the award, he waives the right of trial by jury and the litigation thereby ends. (*Pyle v. Woods*, 674.)

9. Upon an award of commissioners in condemnation proceedings, if the amount awarded is paid by the plaintiff and accepted by the defendant, a decree confirming such action of the parties will be in substance a decree by consent or confession, and will come as fully within the purview of the statute as if the case had gone to trial before a jury and judgment and decree had been entered on the verdict. (*Pyle v. Woods*, 674.)

10. Sec. 5226, Rev. Codes, confers all the jurisdiction necessary to a hearing and assessment of damages, and all the means necessary to carry into effect the proceedings had is conferred by the general statute, sec. 3925. (*Pyle v. Woods*, 674.)

**EMPLOYER'S LIABILITY.**

See Master and Servant.

**EQUITY.**

See Guaranty, 5.

## ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

## ESTRAY LAWS.

See Municipal Corporations, 17-19.

## EVIDENCE.

*Admissibility and Sufficiency.*

1. Evidence in this case examined, and *held*, sufficient to support the findings and judgment. (Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 1.)
2. *Held*, that the evidence is sufficient to sustain the verdict. (State v. Fuller, 372.)
3. *Held*, that the court did not err in the admission of certain evidence. (State v. Fuller, 372.)
4. *Held*, that the court did not err in refusing to strike out certain evidence. (State v. Fuller, 372.)

*Best Evidence—Written Contract.*

5. It was not error for the trial court to sustain a motion to strike out evidence of the contents, character and nature of a written contract, where the contract itself was not produced and it appeared that it was in existence and could have been produced. The writing itself was the best evidence of its contents and the rights conferred thereunder. (Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 1.)

6. A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by the company issuing the prospectus, standing alone, is not sufficient upon which to found a cause of action. Where the action is based on a written contract entered into in pursuance of the statements contained in such prospectus, the presumption is that the entire contract was embodied in the writing. (Idaho Fruit Land Co. v. Great Northern Beet Sugar Co., 1.)

*Law of Sister State—Presumption—Judicial Notice.*

7. Where a question before the court is governed by the rule of the common law instead of by statute, the court will presume, in the absence of proof to the contrary, that the common law prevails in the state where the injury occurred, and that the common law is understood and construed to be the same in the foreign state as it is in the state of the forum. (Maloney v. Winston Bros. Co., 740.)

8. The courts of this state will not take judicial notice of the laws of a sister state. In the absence of pleadings and proof as to

**EVIDENCE (Continued).**

what the laws are in another state, the courts of this state will assume that the laws prevailing in a foreign state are the same as the laws of this state. (*Maloney v. Winston Bros. Co.*, 740.)

See Criminal Law, 7-9; Judgments, 1.

**EXCEPTIONS.**

See Appeal and Error, 15-19.

**EXCHANGE.**

See Bills and Notes, 6, 7; Usury, 1.

**EXECUTION.**

The question as to whether or not several lots or tracts or parcels of land have been sold together under one bid instead of separately, as required by sec. 4484, Rev. Codes, is a question properly to be presented to the court from which the execution issued and on a motion to set aside the sale for the irregularity. It cannot be raised for the first time on appeal either in the same or a collateral proceeding. (*Foore v. Simon Piano Co.*, 167.)

See Corporations, 6.

**EXECUTORS AND ADMINISTRATORS.*****Resignation and Appointment of Successor.***

1. Where an administrator has tendered his resignation and makes his final report as such administrator, an order made by the probate judge approving such report and discharging him as administrator and appointing his successor approves all that is contained in such final report, but does not approve and allow claims against the estate which are under contest upon objections of the heirs to a former report listing such claims, and the allowance of which claims upon the hearing of the former report was expressly ordered by the probate judge to be continued for further consideration. (*Miller v. Lewiston Nat. Bank*, 124.)

***Claims Against Estate.***

2. Where an administrator allows certain claims against the estate and thereafter renders a report listing such claims, and heirs of the deceased object to such report and the allowance of such claims, on the ground that the administrator is interested in such claims as a joint debtor with the decedent, and upon the hearing of such report the probate court approves the same except as to such claims and continues such claims for future consideration, and the administrator tenders his resignation as administrator and renders his final report, and the probate court accepts such resigna-

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**EXECUTORS AND ADMINISTRATORS (Continued).**

tion and appoints his successor, the approval by the probate court of the final report of such administrator does not approve and allow such contested claims. (*Miller v. Lewiston Nat. Bank*, 124.)

3. Where claims are pending against an estate before the probate court, upon an order setting aside their former allowance by the administrator and the probate judge upon objections by the heirs, the probate judge is not required to indorse upon said claims his allowance or rejection of the same within ten days after such order, nor does his failure to do so amount to a rejection of said claims and defeat his jurisdiction to set said claims for hearing upon the objections made by the heirs. (*Miller v. Lewiston Nat. Bank*, 124.)

4. Where claims are filed against an estate and objections are made by heirs of the decedent to their allowance, and such objections are heard and tried by the probate court and thereafter appealed to and heard and tried in the district court, a judgment rendered in the district court against the administrator of said estate for the aggregate amount due upon said claims, with direction that said judgment be paid by the administrator in due course of administration, is in proper form and not erroneous. (*Miller v. Lewiston Nat. Bank*, 124.)

5. The provisions of Rev. Codes, sec. 4071, were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitation prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom; and to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitation prescribed by the general statute, then this statute does not shorten that period and in such case has no effect. (*Miller v. Lewiston Nat. Bank*, 124.)

6. The fact that an administrator allows a claim against the estate, based upon promissory notes upon which the administrator and the deceased guaranteed the payment, does not render void or uncollectible such claim. (*Miller v. Lewiston Nat. Bank*, 124.)

7. The fact that an administrator, jointly liable with the deceased upon a contract of guaranty, allows a claim against such estate founded upon such contract of guaranty, does not show or tend to show a collusion between the administrator and the claimant to allow or enforce such claim against the estate in fraud of the rights of the heirs of said estate. (*Miller v. Lewiston Nat. Bank*, 124.)



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**EXECUTORS AND ADMINISTRATORS (Continued).*****Decedent's Contract of Guaranty.***

8. An action in equity cannot be maintained to release the liability of an estate upon a contract of guaranty made by the decedent, when there exists a legal remedy at law, either affirmative or defensive, which would be adequate, certain and complete. (Miller v. Kettenbach, 253.)

9. Where C. signs a joint and several contract of guaranty, guaranteeing the payment of promissory notes, and afterward dies, and an administrator is appointed, and the holder of such notes files the same as claims against the estate of C., and full opportunity is given to contest such claims upon any legal or equitable ground by the administrator, heirs or creditors of said estate, such administrator, heirs or creditors of said estate cannot afterward maintain an action in equity against the holder of said notes for the purpose of releasing said estate from its liability upon said contracts of guaranty, upon the ground that a conspiracy was entered into between the holder of such notes, the administrator of said estate and the stockholders of the principal debtor, whereby property belonging to the principal debtor was transferred to the holder of such notes at less than its actual and true value and the purchase price thereof improperly applied upon such indebtedness. (Miller v. Kettenbach, 253.)

***Sale of Real Estate.***

10. Under the provisions of sec. 5520, Rev. Codes, when an administrator makes a sale of real estate, he must make a return of his proceedings to the probate court, and a hearing upon such return for the confirmation of the sale must be had and notice thereof must be given in compliance with the provisions of said section. Objections may be made to the confirmation of the sale by anyone interested. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the court finds that the proceedings were unfair or the sum bid disproportionate to the value of the property sold, and if it appears that a sum exceeding such bid by at least ten per cent exclusive of the expenses of a new sale may be obtained, the court may vacate the sale and direct another to be had; if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is then in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. (McGregor v. Jensen, 320.)

11. *Held*, that the phrase "disproportionate to the value," as used in said section 5520, means disproportionate to the value at the time the bid was made. (McGregor v. Jensen, 320.)

**EXECUTORS AND ADMINISTRATORS (Continued).**

12. Where objections are made to the confirmation of the sale and on a hearing it appears to the probate court that the sale was fair and that the sum bid was a reasonable and fair value for the property sold, it is the duty of the probate court to confirm the sale. (McGregor v. Jensen, 320.)

13. On an appeal from an order confirming a sale, the district court is authorized to try the case anew upon the issues made in the probate court, and if it appears from the evidence adduced on the hearing that the proceedings were fair and the sum bid is not disproportionate to the value of the property sold, it is the duty of the district court to affirm the order of confirmation made by the probate court. (McGregor v. Jensen, 320.)

14. *Held*, that the evidence introduced on the trial in the district court establishes the facts that the proceedings in regard to the sale of the real estate involved were fair and regular, and that the bid offered and accepted by the probate court was not disproportionate to the value of the property at the time said bid was made. (McGregor v. Jensen, 320.)

15. *Held*, that the district court erred in setting aside the order confirming the sale of said real estate and accepting the bid of Jensen. (McGregor v. Jensen, 320.)

**Statute of Limitations.**

16. Under the provisions of secs. 5469, 5471, 5461, and 5463 of the Rev. Codes, an administrator of the estate of a deceased person has no power or authority to waive the bar of the statute of limitations so as to set a new date for the statute to begin to run. (Dern v. Olsen, 358.)

17. Under the provisions of sec. 4078, Rev. Codes, an administrator cannot "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations and bind the estate, for the reason that the debt is the obligation of the estate represented by the administrator, and would not be the debt of the party making the acknowledgment or promise and "to be charged thereby." (Dern v. Olsen, 358.)

**FELLOW-SERVANTS.**

See Master and Servant.

**FENCES.**

See Railroads, 4-9.

**FINDINGS.**

See Trial, 3-6.

**FOREIGN CORPORATIONS.**

See Corporations.

**FOREIGN JUDGMENT.**

See Judgment, 1.

**FOREIGN LAW.**

See Evidence, 7, 8.

**FRANCHISE.**

See Elections.

**FRATERNAL SOCIETY.**

See Insurance.

**FRAUD.**

The case of *Nicholls v. Lewis and Clark Mining Co.*, ante, p. 224, 109 Pac. 846, cited and approved, and the case of *Atkins v. Hendree*, 1 Ida. 95, cited and disapproved so far as it holds that no fraud can be perpetrated where there exists the means of ascertaining or discovering the fraud. (*Flynn Group Mining Co. v. Murphy*, 266.)

See Vendor and Vendee.

**FRAUDS, STATUTE OF.**

1. The statute of frauds (subd. 1, sec. 6009, Rev. Codes) will not prevent the recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by the employee during a period exceeding one year, simply because the contract was not reduced to writing. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

2. A contract whereby a corporation agrees to employ D. at a specified salary so long as he continues to own and hold his stock in the corporation does not come within the purview of the statute of frauds (subd. 1, sec. 6009, Rev. Codes), on the ground that the same was not in writing, for the reason that such contract is capable of being fully performed, completed and terminated within a year. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

**GOOD ROADS LAW.**

See Highways.

**GUARANTY.***Contract of Guaranty.*

1. A contract of guaranty indorsed upon the back of a promissory note in the following words, "For value received I hereby

**GUARANTY (Continued).**

guarantee the payment of the within note and waive protest, demand and notice of nonpayment thereof," is a several as well as a joint obligation of each person who executes such contract. (Miller v. Lewiston Nat. Bank, 124.)

2. Such contract of guaranty being several, the obligation of each person who executed such guaranty becomes absolute upon default of the maker of such note. (Miller v. Lewiston Nat. Bank, 124.)

3. Under the provisions of such contract of guaranty, the holder of such note was under no obligation to pursue the maker or use any diligence whatever to enforce the collection of said note against the maker, or to give notice to the guarantors of the nonpayment of said note. (Miller v. Lewiston Nat. Bank, 124.)

4. The holder of a promissory note is under no obligation in equity to pursue the maker of such note rather than a guarantor of the payment of such note, upon default being made in the payment of such note according to its terms, but may rely wholly upon the contract of guaranty and resort to such in enforcing the payment of such obligation. (Miller v. Lewiston Nat. Bank, 124.)

***Release of Guarantor in Equity.***

5. A court of equity will not decree the release of a guarantor upon the contract of guaranty unless special and peculiar circumstances are shown to exist which could not be shown as a defense in an action at law based upon such contract of guaranty. (Miller v. Kettenbach, 253.)

See Executors and Administrators, 8, 9.

**HEIRS.**

See Deeds, 2.

**HIGHWAYS.*****Good Roads Law—Taxes and Funds.***

1. A section of a statute which provides for raising a fund to pay bonds by a special tax and which provides no machinery or method for carrying into effect such section, will be held to be inoperative and void. (Cunningham v. Thompson, 149.)

2. Sec. 21 of an act approved March 16, 1909 (Laws of 1909, p. 274), commonly known as "The Good Roads Law," imposes no duty upon the board of county commissioners to levy the special tax referred to in such section, and provides no method or manner of levying such tax or the collection of the same, and provides no machinery for carrying said section into execution, and is therefore inoperative and void. (Cunningham v. Thompson, 149.)

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HIGHWAYS (Continued).

3. *Held*, that sec. 21 of the act of March 16, 1909 (Laws of 1909, p. 274), is an essential and necessary part of said act, and that it clearly appears that the legislature would not have passed said act without sec. 21 having been made a part thereof, and that sec. 21 and sec. 20 were designed by the legislature to operate for the same purpose—that is, to provide the method of creating a fund for the construction and maintenance of the roads of the county, and that each section depends upon the other. (*Cunningham v. Thompson*, 149.)

4. *Held*, that sec. 21 being operative and void, the entire act is void. (*Cunningham v. Thompson*, 149.)

5. The emergency contemplated by Rev. Codes, sec. 937, which authorizes the board of county commissioners to transfer funds from the current expense fund to the road fund, was such emergency as might arise out of the actions of the elements in destroying or injuring roads or bridges, and not emergencies arising by the failure of the legislature to authorize the levying of an adequate tax to keep the roads in such condition as the board of commissioners deem they should be kept in, or emergencies arising because of inoperative and void acts of the legislature in creating such road fund. (*Cunningham v. Thompson*, 149.)

## HOMICIDE.

1. Under the provisions of sec. 6565, Rev. Codes, involuntary manslaughter is defined to be "The unlawful killing of a human being in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*In re Heigho*, 566.)

2. Under the statute of this state, sec. 6565, Rev. Codes, an unlawful killing, though unintentional and involuntary, if accomplished by one while engaged in the commission of an unlawful act, is manslaughter, and the statute does not circumscribe the means or agency causing the death. This statute covers and includes any and all means and mediums by or through which a death is caused by one engaged in an unlawful act. (*In re Heigho*, 566.)

3. Under the statute of this state, sec. 6565, Rev. Codes, a prosecution for manslaughter may be had where the death of a human being has been caused or accomplished through fright, fear, terror or nervous shock produced by the accused while in the commission of an unlawful act, even though the accused made no hostile demonstration and directed no overt act at the person of the deceased. It would seem that in some instances force or violence may be applied to the mind or nervous system as effectually as to the body. (*In re Heigho*, 566.)

## HUSBAND AND WIFE.

Under the laws of this state, a married woman may bind her separate property jointly by her contract for her own or her husband's debt. (*Tipton v. Ellsworth*, 207.)

## IMPOUNDING ANIMALS.

See *Municipal Corporations*, 17-19.

## INJUNCTIONS.

*In General.*

1. Under the provisions of sec. 4287, Rev. Codes, an injunction is a writ or order requiring a person to refrain from doing a particular act. (*Roberts v. Kartzke*, 552.)

2. The granting of an injunction is a matter of judicial discretion, and the granting of a preliminary restraining order *ex parte* rests still more largely in the discretion of the court or judge. (*Roberts v. Kartzke*, 552.)

3. The judge or court should not grant a temporary restraining order upon the verified complaint alone in an action of great public importance where the party to be affected thereby can be readily notified, except in case of extreme emergency, as a hasty and improvident granting of temporary injunctions, without notice, is not in accord with the fair and orderly administration of justice. (*Roberts v. Kartzke*, 552.)

*Wrongful Issuance—Liability of Municipality.*

4. Under the statute of this state, sec. 4291, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the issuance of an injunction sued out by such municipal corporation. (*Doyle v. City of Sandpoint*, 654.)

5. Where no bond or undertaking is required on the issuance of an injunction, there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously and without probable cause. (*Doyle v. City of Sandpoint*, 654.)

6. A municipal corporation cannot be held for the maliciously suing out of a writ of injunction without probable cause, for the reason that such an act would be *ultra vires* and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting. (*Doyle v. City of Sandpoint*, 654.)

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**INJUNCTIONS (Continued).*****Suspension of Injunction Pending Appeal.***

7. The court may in its sound discretion suspend the operation of an injunction during an appeal. (*Waters v. Dunn*, 450.)

8. *Held*, that on an application to enforce an injunction, a court has the authority to deny such application and make an order suspending the operation of the injunction pending an appeal (*Waters v. Dunn*, 450.)

***Appeal from Order Denying Injunction.***

9. An appeal from an order denying an application for a temporary restraining order does not operate as a supersedeas of the order appealed from, and at the same time in effect grant the restraining order pending the appeal. (*Roberts v. Kartzke*, 552.)

See Elections, 26.

**INSTRUCTIONS.**

See Trial, 1, 2.

**INSURANCE.*****Mutual Benefit or Life Insurance.***

1. Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties and not as mere representations. (*Rasicot v. Royal Neighbors of America*, 85.)

2. The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment. (*Rasicot v. Royal Neighbors of America*, 85.)

3. Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented and at the time honestly believed that she was not pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case and that it would not consider such an application until at least two months after confinement, and the society collected and received dues, assessments and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health, the insurance society will be held to have waived the right to insist on a breach of the

## INSURANCE (Continued).

contract for the falsity of the answer. (*Rasicot v. Royal Neighbors of America*, 85.)

4. Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society. (*Rasicot v. Royal Neighbors of America*, 85.)

5. It is contrary to sound public policy and detrimental to the best interests of society at large to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years, and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then after his death to allow the society to repudiate the contract, on the ground that the policy never went into effect because of some temporary cause or disability which existed at the time of the delivery of the policy, and of which the applicant had no knowledge and which was wholly obviated and did not in any manner contribute to the cause of death, increase the risk or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation. (*Rasicot v. Royal Neighbors of America*, 85.)

6. An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of the delivery of the policy. (*Rasicot v. Royal Neighbors of America*, 85.)

7. A statement made by a married woman who applies for insurance in a fraternal benefit society that she has not consulted with a physician "in regard to a personal ailment" within the last seven years does not cover a single attendance by a physician upon the applicant some three years prior thereto when she was confined and gave birth to a child. Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in the contract. (*Rasicot v. Royal Neighbors of America*, 85.)

8. In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have



**INSURANCE (Continued).**

been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society. (*Rasicot v. Royal Neighbors of America*, 85.)

**INTEREST.**

See Usury.

**INTOXICATING LIQUORS.*****Local Option Law.***

1. Section 31 of the local option statute (Sess. Laws 1909, page 18) defines intoxicating liquors as including "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication." (In *re Lockman*, 465.)

2. Under the definition given by the legislature in sec. 31 of the local option statute, all "spirituous, vinous, malt and fermented liquors" are declared as a matter of law to be intoxicating, and it is unnecessary for the state to prove that any liquor or beverage falling within the enumerated class will in fact produce intoxication. (In *re Lockman*, 465.)

3. Under the provisions of the local option statute (sec. 31 thereof), it is necessary for the state to prove the intoxicating quality of all mixtures and preparations used or intended to be used as beverages which do not fall within the enumerated class designated as "spirituous, vinous, malt and fermented liquors." (In *re Lockman*, 465.)

4. The legislature in the enactment of the local option statute evidently had in mind a twofold object—first, that of discouraging, and as far as possible preventing, intoxication, and intemperance in the use of intoxicants; and secondly, and equally important, that of protecting the youth of the state from acquiring a taste for intoxicants and the habit of indulging in drinks and beverages that contain the intoxicating element. (In *re Lockman*, 465.)

5. In *re Ridenbaugh*, 5 Ida. 377, 49 Pac. 12, cited and approved. (*Mix v. Board of County Commrs.*, 695.)

6. Whenever the legislature enacts a general law declaring a state policy in regard to the prohibition of gambling or the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the state have been given in regard thereto. (*Mix v. Board of County Commrs.*, 695.)

7. The law known as the local option law (Sess. Laws 1909, p. 9), held to be a general law declarative of the policy of the state in regard to traffic in intoxicating liquors. (*Mix v. Board of County Commrs.*, 695.)

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INTOXICATING LIQUORS (Continued).

8. Sec. 7 of the local option law prohibits the board of county commissioners of any county where said law has been adopted from granting any person, firm, association, corporation or club a license to sell or dispose of intoxicating liquors within such county. (Mix v. Board of County Commrs., 695.)

See License Taxes; Municipal Corporations, 11.

## INTOXICATION.

See Jury.

## IRRIGATION.

See Waters and Watercourses.

## JUDGMENT.

*Certification of Foreign Judgment.*

1. *Held*, under the facts of this case that a foreign judgment has been certified in substantial conformity with the requirements of secs. 5980 and 5981 of the Rev. Codes and sec. 905 of the Revised Statutes of the United States, and was entitled to be admitted in evidence. (Nadel v. Campbell, 335.)

*Setting Aside Default.*

2. An application to open and set aside a default is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused, the order will not be disturbed on appeal. (Harr v. Kight, 53.)

3. To entitle a party to relief from a judgment or order entered by default, it is necessary that such person make a sufficient showing of mistake, inadvertence, surprise, or excusable neglect, and in addition thereto that such person has a meritorious defense to such action. (Harr v. Kight, 53.)

4. Showing in this case examined, and *held* that the trial court did not abuse its discretion in refusing to open and set aside a default. (Harr v. Kight, 53.)

*Res Judicata.*

5. A former judgment adjudging that a certain private road has been dedicated to the public is *res adjudicata* as between the parties to such action. (Waldron v. Jenkins, 616.)

6. *Held*, that said former action was not brought for the purpose of laying out and creating a new road, but was brought for

## JUDGMENT (Continued).

the purpose of adjudicating the question whether said road had been dedicated to the use of the public. (*Waldron v. Jenkins*, 616.)

7. As the parties plaintiff and defendant are the same in the action at bar and in the action referred to, the judgment as between them is *res adjudicata*. (*Waldron v. Jenkins*, 616.)

See Criminal Law, 3-6; Justice of Peace.

## JURISDICTION.

See Attachment; Appeal, 1; Justice of Peace.

## JURY.

*Intoxication of Juror.*

It is not error for the trial court to deny a motion for a new trial on account of the intoxication of a juror, where it clearly appears that such intoxication is brought on by the indulgence of the juror during a recess of the court and when the jury is permitted to separate, and no motion is made at the time that the panel be discharged and a new jury selected, or that the particular juror be discharged and another juror selected in his stead, or any objection made to resuming the trial on account of the intoxication of such juror, and it further clearly appears as a fact that the trial was not resumed until the juror had fully recovered his normal condition and faculties, although such conduct of the juror calls for severe censure and punishment from the trial court. (*Walsh v. Winston Bros. Co.*, 768.)

## JUSTICE OF PEACE.

*Continuance—Jurisdiction—Judgment.*

1. Where a summons was duly and regularly served on the defendant and June 12th was named therein as the return date and the defendant failed to appear on the date fixed in the summons for the trial, and his default was thereupon entered and no further action was taken in the case until December 14th following, upon which latter date evidence was introduced and judgment was rendered and entered against the defendant, *held*, that the error committed in continuing the case from June to December was not jurisdictional and did not oust the justice of jurisdiction to hear the proofs and render and enter judgment. (*Nadel v. Campbell*, 335.)

2. Secs. 4701, 4702, 4703 and 4704 of the Rev. Codes of this state prescribe the duties of justices of the peace, and provide the practice to be pursued in the granting of continuances; and while it would be error to grant a continuance different from or in any other manner than provided by these provisions of the statute, such

**JUSTICE OF PEACE (Continued).**

error must be corrected by appeal or direct attack upon the judgment, and is not jurisdictional, and does not divest the justice of jurisdiction to proceed further in the case. (*Nadel v. Campbell*, 335.)

**LAW OF OTHER STATES.**

See Evidence, 7, 8.

**LEASE.**

See Banks and Banking.

**LICENSE TAXES.**

1. *Held*, under the provisions of sec. 1835, Rev. Codes, that where a person engages in the business of selling intoxicating liquors and fails or neglects to take out a license, an action may be maintained against him by the state for the recovery of the license tax. (*State v. Wall*, 300.)

2. The only action authorized by chap. 2, title 10, of the Political Code, is a civil action to recover a license tax, damages and costs of action. (*State v. Wall*, 300.)

3. Under the provisions of sec. 6983, Rev. Codes, every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by the laws of this state, without taking out or procuring the required license, is guilty of a misdemeanor. (*State v. Wall*, 300.)

4. Under the provisions of the statute, the license tax must be paid and a license procured before the commencement of any business or occupation requiring the payment of a license tax. (*State v. Wall*, 300.)

5. The license tax required to be paid before a person may engage in the business requiring a license is not imposed as a penalty, but is a debt due the county or state for doing or conducting the business. The penalty for doing such business without a license is made a misdemeanor. (*State v. Wall*, 300.)

See Municipal Corporations, 7-11.

**LIFE ESTATE.**

See Wills, 2, 3.

**LIMITATION OF ACTIONS.*****Acknowledgment and New Promise.***

1. Under the provisions of sec. 4078 of the Rev. Codes, no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the operation of the Idaho, Vol. 18—58

**LIMITATION OF ACTIONS (Continued).**

statute of limitations, unless the same is contained in some writing signed by the party to be charged thereby. (*Dern v. Olsen*, 358.)

2. Under the provisions of sec. 4078 of the Rev. Codes, a clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the statute begins to run. (*Dern v. Olsen*, 358.)

3. Where O. was owing D. a note and mortgage which was overdue but not yet barred by the statute of limitations, and O. wrote D. telling him of a prospective sale of mining property he had in view, and saying, "Now, if I can make this deal will try and get enough money down to liquidate the mortgage you hold against the property," such letter constitutes an "acknowledgment" of a "continuing contract" within the meaning of sec. 4078, Rev. Codes, and sets a new date from which the statute of limitations begins to run. (*Dern v. Olsen*, 358.)

4. *Held*, further, that the words, "If I can make this deal will try and get enough money down to liquidate the mortgage," constitute a condition that the debtor proposed to place upon the sale of the property and demand from the purchaser, rather than a condition as to the payment of the debt to his creditor, and did not negative an implied promise to pay at some time even if the sale should not be made. (*Dern v. Olsen*, 358.)

See Adverse Possession; Executors and Administrators, 16, 17.

**LIQUORS.**

See Intoxicating Liquors.

**LOCAL OPTION LAW.**

See Intoxicating Liquors.

**MANSLAUGHTER.**

See Homicide.

**MARRIED WOMEN.**

See Husband and Wife.

**MASTER AND SERVANT.*****Liability of Employer to Employee for Personal Injuries.***

1. *Held*, under the facts of this case that it was the duty of master to see that the scaffold from which the defendant fell and was injured was safely erected. (*Craesafulli v. Winston Bros. Co.*, 158.)

**MASTER AND SERVANT (Continued).**

2. Where a laborer seeks and obtains employment at a hazardous and dangerous task and which must necessarily be prosecuted in a dangerous place, he thereby assumes the ordinary risks incident to the employment and attendant on the place where the work is prosecuted, but he does not thereby assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition, as a place of the kind should be maintained in which employees are to prosecute their work. (*Maloney v. Winston Bros. Co.*, 740.)

3. In the case of a hazardous work like driving a railroad tunnel through the mountain, an increased risk is assumed and an increased duty is imposed by law on both the master and servant proportionate to the dangers of the place and the risks of the employment—on the master to exercise increased care and diligence in maintaining the place in as safe a condition as the nature of the work will permit, and upon the servant to either assume or avoid patent and obvious dangers and those necessarily incident to the work and the place in which the work is being prosecuted. (*Maloney v. Winston Bros. Co.*, 740.)

4. It is the established rule of law that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon the grade or rank of the employee or fellow-servant to whom the negligent act is traceable. (*Maloney v. Winston Bros. Co.*, 740.)

5. In an action for personal injuries received by and on account of the negligence of the master, negligence must be shown, and this may be done by positive testimony of the commission of a wrongful act by the master or the neglect by him to discharge a positive duty, or it may be shown by proof of the conditions of the place in which the master placed the servant or the attendant circumstances surrounding the occurrence and the happening of the thing which caused the injury. (*Maloney v. Winston Bros. Co.*, 740.)

6. Where the servant is under the immediate direction of a superior employee or a vice-principal and performs each task or duty at the time and in the manner directed by his superior, and the servant has no discretion in the matter of inspecting or making safe the place in which he is to work, he has a right to assume that the superior or vice-principal has examined and inspected the place in which he is set to work and has found it in a reasonably safe condition, and in such case the servant is only chargeable with the duty of taking notice of conditions as he sees them and those dangers that are patent and obvious. (*Maloney v. Winston Bros. Co.*, 740.)

**MASTER AND SERVANT (Continued).**

7. Where the master is engaged in driving a railroad tunnel and has a large number of men engaged in drilling, blasting and shoveling away the rock and earth, it is the duty of the master to take reasonable precaution for the safety of the men, and to that end to have some person intrusted with the duty of examining and inspecting the place after shots have been fired, directing the manner and method of removing loose rock or earth from the walls and roof, and making the place reasonably safe for the men who are to work therein. (*Maloney v. Winston Bros. Co.*, 740.)

8. *Held*, that the fellow-servant doctrine, assumption of risk and contributory negligence rules are not applicable to the facts of this case. (*Craesafulli v. Winston Bros. Co.*, 158.)

9. In an action to recover damages for personal injuries, evidence which tends to show the respective duties and relations of the alleged principal and his employees, as well as their relations to the business generally, and all of the surrounding circumstances, is admissible to aid in determining whether the injured employee sustained such injury by reason of the negligence of a fellow-servant or of a vice-principal. (*Walsh v. Winston Bros. Co.*, 768.)

10. Evidence in this case examined and *held* to support the verdict of the jury. (*Walsh v. Winston Bros. Co.*, 768.)

11. *Maloney v. Winston Bros. Co.*, *ante*, p. 740, 111 Pac. 1080, cited and approved as the law governing this case. (*Walsh v. Winston Bros. Co.*, 768.)

12. Instructions examined, considered and *held* not to be erroneous. (*Maloney v. Winston Bros. Co.*, 740.)

13. *Held*, that the instruction given by the court fairly covered the case and substantially included all of the proper instructions requested by appellants. (*Johnson v. Gary*, 623.)

14. *Held*, that there was a substantial conflict in the evidence and that the evidence was sufficient to sustain the verdict. (*Johnson v. Gary*, 623.)

***Damages for Personal Injury to Employee.***

15. Where an injury has been received by the servant on account of the negligence of the master, damages should be computed and ascertained and awarded on the basis, as nearly as possible, of compensating the servant for the pain, suffering and loss he has sustained and will sustain in the future on account of the injury; and he should be placed, as nearly as it is possible to estimate, in as good a position as he was before the injury was inflicted. (*Maloney v. Winston Bros. Co.*, 740.)

16. Where it is alleged in the complaint that because of the personal injury received, a total loss of earning capacity resulted, and

**MASTER AND SERVANT (Continued).**

that such injury was the result of the negligence of the defendants, a cause of action is stated, and in such a case the amount of damages sustained depends on the nature of the injury. If the evidence introduced, without objection, established the allegations as to bodily pain, mental anguish and incapacity to earn money, the jury would be justified in finding a verdict for the plaintiff. (*Johnson v. Gary*, 623.)

See Corporations, 1, 2; Frauds, Statute of

**MECHANICS' LIENS.**

1. The surety for a contractor on a building contract cannot maintain an action for the foreclosure of a lien for materials furnished in the carrying out of the contract and erection of the building, where it appears that the full contract price has been paid to the contractor, or on his order, prior to any claim being made by the surety or notice being given to the owner of the building. (*Sanders v. Keller*, 590.)

2. An admission made by the contractor in the course of the performance of his contract or upon the completion thereof as to having no claims for extras against the owner of the building, held, admissible against the surety in an action where the surety seeks to foreclose a materialman's lien for materials furnished in the construction of the building. (*Sanders v. Keller*, 590.)

**MERGER.**

See Actions, 2.

**MINES AND MINING.***Location of Claims.*

1. Where an excessive mineral location has been made through mistake, while the locator was acting in good faith, the location will be void only as to the excess; but where the locator has purposely included within his exterior boundaries an excessive area with the fraudulent intent of holding the entire area under one location, such location is void; or if made so large that the location cannot be deemed the result of innocent error or mistake, fraud may be presumed. (*Nicholls v. Lewis & Clark Mining Co.*, 224.)

2. Where the exterior boundaries of a mineral location include such an unreasonably excessive area that such boundary lines cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim as located under the statute, such location will be held void on the ground that the boundaries of the claim have never been marked



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**MINES AND MINING (Continued).**

and established as required by law. (*Nicholls v. Lewis & Clark Mining Co.*, 224.)

3. Where the boundaries of a claim are made excessive in size with fraudulent intent, it is void; or if so large as to preclude the presumption of innocent error, fraud will be presumed. (*Flynn Group Mining Co. v. Murphy*, 266.)

4. Where a discovery is made on a vein of mineral-bearing rock and the notice provides that such claim extends 700 feet in a northwesterly direction and 800 feet in a southeasterly direction from such discovery, and the corner stakes on the southeasterly end are so placed as to take in more than 800 feet of such vein, subsequent locators may legally locate the excess of ground, as the first location is valid only to the extent of 800 feet southeasterly from the point of discovery on said claim. (*Flynn Group Mining Co. v. Murphy*, 266.)

5. The law requires the locator to make his location so definite and certain that from the location notice and stakes and monuments on the ground the limits and boundaries of the claim may be ascertained, and so definite and certain as to prevent the changing or floating of such claim. (*Flynn Group Mining Co. v. Murphy*, 266.)

6. A subsequent valid location of a mining claim in this state cannot be made on mineral land that is already covered by a valid location. (*Flynn Group Mining Co. v. Murphy*, 266.)

7. Under the provisions of sec. 3207, Rev. Codes, the locator of a mining claim is required to erect a monument at the place of discovery upon which, among other things, he must place the distance claimed along the vein each way from such monument. (*Flynn Group Mining Co. v. Murphy*, 266.)

8. *Held*, that where a location notice states that the mining claim which it describes extends 700 feet in a northwesterly direction and 800 feet in a southeasterly direction along the lode, a locator may go to the point of discovery of such claim and measure the ground from the discovery point 800 feet in a southeasterly direction along the lode, and if there be any unlocated ground beyond that 800 feet, may legally locate it, regardless of the fact that the easterly end stakes had been established beyond the 800 feet. (*Flynn Group Mining Co. v. Murphy*, 266.)

9. Under the provisions of sec. 3207, Rev. Codes, 1909, the location notice is not required to describe the exterior boundaries of the claim. (*Flynn Group Mining Co. v. Murphy*, 266.)

10. Where it appears that a mining claim has been located in good faith, if by any reasonable construction the language used in the location notice describing the claim and referring to natural objects and permanent monuments imparts knowledge of the location

**MINES AND MINING (Continued).**

of such claim to a subsequent locator, it is sufficient. (Flynn Group Mining Co. v. Murphy, 266.)

11. *Held*, that the locator had actual notice that the ground in controversy had been located, as well as constructive notice by an examination of the recorded notice, and that no technicalities will be resorted to to sustain his relocation of the same ground. (Flynn Group Mining Co. v. Murphy, 266.)

12. *Held*, that the finding of the court to the effect that the respondent had performed the assessment work on the Murphy Fraction for nine years and that he had worked and was in possession of said fraction for more than five years, and that during said period of time there was no adverse claim made to said premises or to any part thereof, is fully sustained by the evidence. (Flynn Group Mining Co. v. Murphy, 266.)

**MORTGAGES.*****Foreclosure—Attorney Fees.***

1. Where an attorney who has not been paid his fees for procuring a decree of foreclosure of a mortgage seeks to have the satisfaction of the judgment vacated and set aside and execution issue in his favor for the amount of his unpaid fees, on the grounds that such judgment was satisfied through fraud and collusion between the judgment debtor and judgment creditor for the purpose of defrauding him out of his fees, he is under the necessity of establishing the amount of fees still due him as against the client and of establishing the charge of fraud and collusion as against both his client and the judgment debtor, and the parties are entitled to their day in court for the purpose of joining issue and having a hearing thereon. (Dahlstrom v. Featherstone, 179.)

2. A judgment in a foreclosure suit awarding attorney's fees to the judgment creditor may be collected in full by the judgment creditor, and satisfaction thereof may be entered by him in conformity with the provisions of sec. 4461, Rev. Codes, unless the attorney has previously given notice to the judgment debtor and taken steps for the purpose of establishing the equity of his lien and having the same lay hold upon the original judgment procured by him for the security and payment of the fees earned by him in obtaining the original judgment. (Dahlstrom v. Featherstone, 179.)

3. In the absence of notice that the attorney's fees have not been paid and that the attorney claims a lien on the judgment for that purpose, the judgment debtor is authorized and protected in paying the entire judgment to or settling it with the judgment creditor. (Dahlstrom v. Featherstone, 179.)

**MORTGAGES (Continued).**

4. Where a judgment has been satisfied of record in conformity with the provisions of statute, sec. 4461, Rev. Codes, the attorney who procured the judgment and who has failed and neglected to take any steps for the purpose of fastening the equity of his lien upon the judgment cannot bring the parties into court by the service of a notice and motion on the attorneys who represented the respective parties in the original action and by service of a notice through the mails on his quondam client. (*Dahlstrom v. Featherstone*, 179.)

***Foreclosure—Appeal.***

5. Where a final decree has been entered in a foreclosure suit awarding judgment and attorney's fees in favor of the creditor, and thereafter the judgment is satisfied of record by the judgment creditor in the manner provided by statute, and the court, on motion of the attorney who procured the judgment, vacates and sets aside the satisfaction of judgment and enters an order or judgment adjudging the attorney to be the equitable assignee of the judgment in the amount of fees still due him, and ordering an execution to issue out of the original action in favor of the attorney, such a judgment or order is a final judgment within the purview and meaning of subd. 1, sec. 4807, Rev. Codes, and an appeal may be prosecuted therefrom within one year from the entry of such judgment. (*Dahlstrom v. Featherstone*, 179.)

6. Where H. and C. execute a mortgage upon real property, and the property is afterward transferred to K., who assumes and agrees to pay such mortgage, and K. thereafter transfers said property to M., who assumes and agrees to pay such mortgage, in an action to foreclose such mortgage, all of said parties are made defendants, and a joint judgment is rendered against all, foreclosing said mortgage and directing a deficiency judgment to be entered, and M. appeals from such judgment, the appeal will be dismissed upon failure to serve the notice of appeal upon H., C., and K., notwithstanding the fact that judgment by default was entered against them. (*The Diamond Bank v. Van Meter*, 243.)

See Bills and Notes, 3.

**MOVING PICTURES.**

See Sunday Law.

**MUNICIPAL CORPORATIONS.*****Incorporation of Village.***

1. *Held*, that the evidence is not sufficient to sustain the finding of the court that there were not 200 actual residents within the corporate limits of said village at the time of filing the petition for

**MUNICIPAL CORPORATIONS (Continued).**

incorporation and at the time of making the order of the board incorporating said town. (*Village of Ilo v. Ramey*, 642.)

2. The provisions of sec. 2222, Rev. Codes, authorizing the incorporation of a village must be liberally construed. (*Village of Ilo v. Ramey*, 642.)

3. *Held*, under the provisions of said sec. 1950, that appellants had the right to appeal from an order of the board of county commissioners incorporating the village of Ilo. (*Village of Ilo v. Ramey*, 642.)

***Special Charter Cities—Amendment of Charter.***

4. Under the provisions of the constitution, the special charter of the city of Lewiston may be amended by a special law enacted for that specific purpose, or by a general law which declares a state policy concerning police regulations or in regard to matters affecting the state at large. (*Mix v. Board of County Commrs.*, 695.)

5. Ordinances providing for the pavement of streets, construction of sewers and levying assessments to pay therefor are matters of local concern, and the special charters of the cities of this state in regard to such local matters can be amended only by special law. (*Mix v. Board of County Commrs.*, 695.)

6. *Boise City National Bank v. Boise City*, 15 Ida. 792, 100 Pac. 93, cited and distinguished. (*Mix v. Board of County Commrs.*, 695.)

***Power to License Business Contrary to State Law.***

7. When the general law prohibits or makes a certain business criminal, the city cannot make such business lawful by licensing it. (*Mix v. Board of County Commrs.*, 695.)

8. Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state. (*Mix v. Board of County Commrs.*, 695.)

9. Under the provisions of sec. 63 of the special charter of the city of Lewiston, said city is prohibited from issuing a license authorizing anyone to do any act or engage in any business which is made unlawful by the general laws of the state. (*Mix v. Board of County Commrs.*, 695.)

10. The phrase "law of the land" as used in said section includes the general laws of the state. (*Mix v. Board of County Commrs.*, 695.)

***Power to License Sale of Liquors.***

11. The legislature by enacting the special charter of the city of Lewiston did not delegate to said city the authority to license per-

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**MUNICIPAL CORPORATIONS (Continued).**

sons to sell intoxicating liquors within such city contrary to the general law of the state. (*Mix v. Board of County Commrs.*, 695.)

***Enactment, Amendment, and Repeal of Ordinances—Title of Ordinance.***

12. Under the provisions of sec. 2276, Rev. Codes, an ordinance must contain no subject which shall not be clearly expressed in its title. (*Best v. Broadhead*, 11.)

13. The title of an ordinance, "An act relating to domestic animals and prohibiting their running at large," is sufficient to authorize the incorporation in such ordinance of provisions incident to and regulating animals running at large, such as naming the kind, the territory or place in which they shall not run at large, the impounding and sale, the fees to be collected, and the penalty. It is sufficient if the title in its general scope clearly expresses the objects and purposes of the ordinance. (*Best v. Broadhead*, 11.)

14. Sec. 2274, Rev. Codes, providing, "The style of all ordinances shall be: 'Be it ordained by the mayor and council of the city of ——— or the chairman and board of trustees of the village of ———,' " is directory, and the enacting clause of a village ordinance as follows: "Be it ordained by the town of Post Falls," is sufficient, as such enacting clause indicates the intention and declaration of the village to legislate. (*Best v. Broadhead*, 11.)

15. Under the provisions of sec. 2276, Rev. Codes, "no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Under this provision of the statute, an amendatory ordinance which purports to amend an ordinance by inserting therein particular language without indicating where such insertion shall be made, or containing the entire ordinance as amended, or the particular section amended, is void. (*Best v. Broadhead*, 11.)

16. Where the provisions of an amendatory ordinance are illegal and void, and it is apparent that such amendment is to be substituted for the ordinance repealed, or for a particular part thereof, the illegal and void character of the repealing ordinance will also render void the repealing clause. (*Best v. Broadhead*, 11.)

***Ordinance Forbidding Horses Running at Large.***

17. Under the provisions of subd. 15 of sec. 15 of an act of the legislature providing for the organization, government and powers of cities and villages (see Sess. Laws 1905, p. 113), the cities and villages of the state have power and authority to pass ordinances to prevent the running at large of horses within corporate limits. (*Best v. Broadhead*, 11.)

**MUNICIPAL CORPORATIONS (Continued).**

18. *Held*, that the court erred in not admitting all evidence offered tending to establish the defense set up in the answer. (*Best v. Broadhead*, 11.)

19. *Held*, that the phrase "other animals" as used in said section is broad enough to and does include horses and all other animals. (*Best v. Broadhead*, 11.)

*Issuance of Refunding Bonds.*

20. Under the provisions of sec. 2315, Rev. Codes, a municipality has the authority to issue refunding bonds for the purpose of redemption of outstanding indebtedness when the same can be done to the profit and benefit of the municipality, and this may be done without the submission of the question of the issuance of such bonds to the electors of the municipality. (*Veatch v. City of Moscow*, 313.)

21. The provisions of sec. 2316, Rev. Codes, were intended to apply to the issuance of refunding bonds of municipalities when the issuance of such bonds would not create an additional indebtedness or liability of the municipality. (*Veatch v. City of Moscow*, 313.)

22. Under the constitution of this state, the legislature has authority to empower municipalities to negotiate for the sale and issuance of refunding bonds without submitting the question to the electors of such municipality, where it can be done to the profit and benefit of the municipality and without incurring any additional liability. (*Veatch v. City of Moscow*, 313.)

23. The issuance of refunding bonds is not the creation of a new indebtedness within the meaning of the provisions of sec. 3, art. 8, of the constitution, when it does not increase the indebtedness or liability of the municipality. (*Veatch v. City of Moscow*, 313.)

24. So far as the decision in the case of *Bannock Co. v. Bunting*, 4 Ida. 156, 37 Pac. 377, is in conflict with the views expressed in this opinion, it is overruled. (*Veatch v. City of Moscow*, 313.)

See Injunctions, 4-6.

**NATIONAL BANKS.**

See Banks and Banking.

**NEGLIGENCE.**

The term "gross negligence" is used to denote a degree of carelessness greater than the degree implied by "ordinary negligence," and is sometimes used to denote wilful negligence or fraud. (*Strong v. Western Tel. Co.*, 389.)

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEW TRIAL.

*Statement on Motion for New Trial.*

1. Under the provisions of subd. 3 of sec. 4441, Rev. Codes, if a proposed statement on motion for a new trial be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto and serve the same or a copy thereof on the moving party. If the amendments be adopted, the statement shall be amended accordingly and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall within ten days thereafter be, by the moving party, delivered to the clerk of the court for the judge and thereupon the same proceedings for the settlement of the statement shall be taken by the parties and clerk and judge as are required for the settlement of bills of exception by sec. 4430, Rev. Codes. And if no amendments are served within the time designated, or if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge for settlement without notice to the adverse party. (Coast Lumber Co. v. Wood, 28.)

2. Where proposed amendments and the proposed statement are not delivered to the clerk of the court for the judge within ten days after the service of such amendments upon the moving party, the presumption is that such amendments have been adopted and will be so treated, and the amendments and statement may be presented to the judge for settlement within a reasonable time after the expiration of said ten days. (Coast Lumber Co. v. Wood, 28.)

3. Held, under the facts of this case that the court had not lost jurisdiction to settle the statement and that he erred in refusing to settle the same. (Coast Lumber Co. v. Wood, 28.)

4. Under the provisions of said subd. 3 of sec. 4441, Rev. Codes, in settling the statement, it is the duty of the judge to strike out of it all redundant and useless matter and make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter or to any inaccurate statement. (Coast Lumber Co. v. Wood, 28.)

5. The case of *Miller v. Hunt*, 7 Ida. 486, 63 Pac. 803, cited and distinguished. (Coast Lumber Co. v. Wood, 28.)

*Discretion in Granting Motion.*

6. A motion for a new trial is addressed to the sound discretion of the trial court, and the court's ruling thereon will not be dis-

**NEW TRIAL (Continued).**

turbed on appeal unless it appears there has been an abuse of such discretion. (Walsh v. Winston Bros. Co., 768.)

7. *Held*, that the court did not err in denying a new trial on the ground of newly discovered evidence. (Flynn Group Mining Co. v. Murphy, 266.)

See Jury.

**NOTICE.**

See Appeal and Error, 5-7.

**ORDINANCES.**

See Municipal Corporations.

**PAROL EVIDENCE.**

See Evidence, 5, 6.

**PARTIES.**

Where a contract pleaded *in haec verba* shows on its face a joint and several liability against the defendants and another party who is not made a party defendant, the defect in naming parties defendant, if any exists, cannot be raised by general demurrer going to the sufficiency of the complaint, but must be raised by special demurrer on the grounds of defect or misjoinder of parties defendant. (Bonham Nat. Bank v. Grimes Pass etc. Co., 629.)

**PLEADING.*****In General.***

1. Under the provisions of sec. 4168, Rev. Codes, the complaint must contain, among other things, a statement of the facts constituting the cause of action in ordinary and concise language and a demand for the relief claimed. (Bates v. Capital State Bank, 429.)

2. The technicalities of pleading under the common law have been dispensed with by the provisions of our code. (Bates v. Capital State Bank, 429.)

3. Implications of law arising from facts alleged in the complaint and presumptions of law arising therefrom need not be pleaded. (Bates v. Capital State Bank, 429.)

4. *Held*, that the complaint states a cause of action. (Bates v. Capital State Bank, 429.)

5. *Held*, that the demurrer to the complaint must be sustained on the ground that the complaint does not state a cause of action warranting the issuance of the writs prayed for. (Waters v. Dunn, 450.)



**PLEADING (Continued).**

5a. Where a complaint contains several causes of action separately stated, and the demurrer is a general demurrer directed against the complaint as a whole and not against any separate cause of action, it should be overruled if any one of the causes of action is well pleaded. (*Bonham Nat. Bank v. Grimes Pass etc. Co.*, 629.)

***Commingleing Causes of Action.***

6. Where two or more causes of action are improperly united and commingled in one count in the complaint, the proper procedure to reach the defect is by motion to require the plaintiff to separately state his several causes of action in different counts. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

7. A cause of action arising on an express contract for the payment of a fixed and specified salary may be united in the same action with a cause of action for the same services on an implied contract to pay the reasonable value of such services. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

***Amendments.***

8. It is not error for the trial court to refuse a proffered amendment after the evidence has been concluded, where there is no evidence to support the allegations of such proposed amendment. (*Heath v. Potlatch Lumber Co.*, 42.)

9. Where an amended answer has been filed in a case which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried. (*Rasicot v. Royal Neighbors of America*, 85.)

***Variance.***

10. Under the provisions of sec. 4226, Rev. Codes, no variance between the allegation and the proof is deemed to be material unless it has actually misled the adverse party to his prejudice, and whenever there is such variance, it is the duty of the adverse party to make seasonable objection on that ground, and if objection is not made, it cannot be raised for the first time either on motion for a new trial or on appeal. (*Johnson v. Gary*, 623.)

See Actions; Corporations, 3.

**PRESCRIPTION.**

See Adverse Possession; Limitation of Actions.

**PRIMARY ELECTIONS.**

See Elections.

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**PRINCIPAL AND SURETY.**

See Guaranty.

**PROBATE LAW.**

See Executors and Administrators; Wills.

**PROCESS.**

1. Where a summons or an *alias* summons is published by order of the court and the name of the attorney for the plaintiff as indorsed on the summons does not appear in the summons as published, the omission is not fatal to the jurisdiction, and does not invalidate the service by publication. The provision of subd. 5, sec. 4140, requiring that "the name of plaintiff's attorney, with his postoffice address or residence, must be indorsed on the summons," is directory and not mandatory. (*Foore v. Simon Piano Co.*, 167.)

2. Where the notice contained in a summons is given under the provisions of subd. 4, sec. 4140, instead of under the provisions of subd. 5 of that section, and notifies the defendant that if it fails to appear the plaintiff "will take judgment for the sum demanded in the complaint," naming it, instead of notifying the defendant that the "plaintiff will apply to the court for the relief demanded in the complaint," and the plaintiff applies to the court for the relief demanded instead of taking a default judgment by the clerk, the error or mistake is not fatal to the jurisdiction of the court. (*Snake River Valley Irr. Dist. v. Stevens*, 541.)

See Justice of Peace.

**PROSTITUTION.**

See Conspiracy.

**PUBLIC POLICY.**

Sound public policy can never run counter to the principles of honest and fair dealing, and the rule of public policy cannot be invoked to defeat the recovery of an honest claim. (*Darknell v. Coeur D'Alene etc. Transp. Co.*, 61.)

**QUIETING TITLE.**

1. Under the provisions of sec. 4538 of the Rev. Codes, an action may be maintained by a remainderman for the protection of a contingent remainder as against one who claims an estate or interest in the property adverse to such remainderman. (*Wilson v. Linder*, 438.)

2. Evidence held sufficient to support the findings made by the court. (*Tomsche v. Hummel*, 23.)

## QUIETING TITLE (Continued).

3. *Held*, that the description of the real estate in the judgment or decree, required to be conveyed by the defendant to the plaintiff, is sufficient. (*Fouch v. Bates*, 374.)

## RAILROADS.

*Constitutionality of Statute Creating Districts for Construction of Railroads.*

1. The act of the legislature approved March 16, 1909 (Sess. Laws 1909, p. 238), providing for the formation of railroad districts and the voting of bonds and purchase or construction of railroads by such districts and providing for operating or leasing the same, is in violation of the provisions of sec. 4 of art. 8 of the state constitution and contrary to the spirit of secs. 2 and 3 of art. 8 and sec. 4 of art. 12 of the constitution. (*Atkinson v. Board of Commrs.*, 282.)

2. It was never anticipated or intended by the framers of the constitution that counties, or other political subdivisions, would or could enter into the business of railroad building, but, on the contrary, the specific prohibitions found in the constitution manifest a clear purpose and intent to prohibit the state or county, or any subdivision thereof, from entering into any such enterprise. (*Atkinson v. Board of Commrs.*, 282.)

3. The building of a railroad is not within itself an exercise of governmental power, but is purely a business enterprise, and if it is to be engaged in by the state or any of its political subdivisions, it must be done by virtue of the proprietary powers of the state or political subdivisions thereof and not under the police or general welfare powers of the state. (*Atkinson v. Board of Commrs.*, 282.)

*Fencing Track.*

4. Under the provisions of Rev. Codes, sec. 2815, it is the duty of every railroad company operating any steam or electric railroad in this state to erect and maintain lawful fences on each side of its road where the same passes through, along, or adjoining inclosed or cultivated fields or inclosed lands. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

5. Until such fences shall be made and maintained, such corporation shall be liable to pay all damages which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals on said road, regardless of whether the person operating or in charge of such engine or cars was negligent or not. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

6. The language used in sec. 2815 as follows, "where the same passes through, along or adjoining inclosed or cultivated fields or inclosed lands," refers to country districts or where a railroad runs

**RAILROADS (Continued).**

along, adjoining or through cultivated fields or inclosed lands, and was not intended to apply to municipalities or towns whether incorporated or not, unless such town was so extended as to include cultivated fields or inclosed lands other than residence lots. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

7. It is clearly within the power of the legislature as a police regulation to require railroad companies to fence their track, and it is for the judgment of the legislature whether such duty shall be extended to the requirement that a railroad shall fence its road in municipalities or towns or in rural sections where the lands are not cultivated or inclosed, such as the open prairie, sage-brush and timber lands not cultivated or inclosed. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

8. *Held*, under the evidence in this case that the appellant was not required to fence its road where the animal for which damages were sought entered upon the track. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

9. A railroad company is not required, under the provisions of sec. 2815, to fence its road where the same runs through a narrow canyon with a public traveled road occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on one side of the track, and residences and stores occupying almost the entire space between the ends of the ties and the foot of a precipitous mountain on the other side, and there are no cultivated fields or inclosed lands through, along or adjoining which such road runs at the place of the accident. (*Bernardi v. Northern Pacific Ry. Co.*, 76.)

See Eminent Domain.

**RAPE.**

On a trial for rape, where the female was under the age of consent at the time of the commission of the offense, evidence as to the chastity of the prosecutrix, or that she had previously had sexual intercourse with other men, is not admissible. (*State v. Hammock*, 424.)

**RECEIVERS.**

Where a judgment was entered holding certain sales and transfers of personal and other property fraudulent and void, and a receiver was appointed to take charge of such property and an appeal was taken by the defendants and an undertaking on appeal in the sum of \$300 was filed, the court has the jurisdiction and power to continue the receivership for the preservation of such property pending the appeal. (*Morbeck v. Bradford-Kennedy Co.*, 458.)

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**REFUNDING BONDS.**

See Municipal Corporations, 20-24.

**RELEASE.**

See Compromise and Settlement.

**REMAINDERS.**

See Wills, 2, 3.

**REPLEVIN.**

*Held*, that this is in form an action in replevin or claim and delivery under the provisions of the statute of Idaho. (*Bates v. Capital State Bank*, 429.)

**RESCISSION.**

See Vendor and Vendee.

**RESIDENCE.**

See Domicile.

**RES JUDICATA.**

See Judgment, 5-7.

**REVIEW, WRIT OF.**

See Certiorari.

**ROADS—GOOD ROADS LAW.**

See Highways.

**SALES.*****Warranty and Breach Thereof.***

1. Where a contract is made for the sale of a safe described in the contract as a "No. 8 F. & B. Victor Safe," in an action founded upon such contract for the recovery of the purchase price, where a defense is made upon the ground of breach of warranty, parol evidence may be received showing the statements and representations of the seller to the purchaser at the time and prior to the execution of said contract, as to what a No. 8 F. & B. Victor safe, as designated in said contract, meant and its character and description. (*Barnett v. Hagan*, 104.)

2. Where a safe is purchased, and an implied warranty arises out of the transaction to the effect that such safe is fireproof, and is a new safe, and in good condition, in an action based upon the contract of purchase, where breach of warranty is plead as a defense, it is error to admit evidence tending to show that the safe

**SALES (Continued).**

was not made in the same way or upon the same plan or theory as other standard fireproof safes. (Barnett v. Hagan, 104.)

3. In determining whether a safe warranted to be fireproof is in fact fireproof, evidence may be received showing that safes made by the same company, of like kind and material and method of construction, had passed through fires and withstood the effects of heat without any material injury to the contents of such safes; but comparison cannot be made with safes made by other manufacturers of different kind and materials and constructed upon different plans and theories. (Barnett v. Hagan, 104.)

4. Where breach of warranty is plead as a defense, evidence should not be admitted which goes outside and beyond the terms of the warranty and which tends to show that the article warranted does not possess certain other characteristics or qualities which were not covered by the warranty. (Barnett v. Hagan, 104.)

**SCENIC RAILWAY.**

See Sunday Law.

**SENTENCE.**

See Criminal Law, 3-6.

**SHELLEY'S CASE.**

See Deeds, 2.

**SHORT WEIGHTS.**

See Criminal Law, 1, 2.

**STATEMENT.**

See Appeal and Error, 15-19; New Trial, 1-5.

**STATUTE OF FRAUDS.**

See Frauds, Statute of.

**STATUTE OF LIMITATIONS.**

See Limitation of Actions.

**STATUTES.***Construction of Statutes.*

1. Laws are enacted to be read and obeyed by the people, and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass

**STATUTES (Continued).**

of the people who are expected to read, obey and uphold them. (Adams v. Lansdon, 483.)

2. Words used in a statute without any technical meaning or application should be given their ordinary significance as they are popularly understood, and the language used by the legislature must be construed in the light of the common acceptance of the terms employed. (In re Bossner, 519.)

See Constitutional Law.

**STENOGRAPHIC RECORD.**

See Appeal and Error, 8-11.

**SUMMONS.**

See Process.

**SUNDAY LAWS.*****Places of Amusement—Scenic Railway—Moving Pictures.***

1. Section 6825 of the Rev. Codes provides that "It shall be unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance-house, racetrack, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling-alley, variety hall, or any such place of public amusement. . . ." (In re Hull, 475.)

2. *Held*, that in order to bring a public amusement not specifically enumerated by the statute (sec. 6825, Rev. Codes), under the general language of "any such place of public amusement," the likeness or similarity must exist in something other than the mere fact that it is a "public amusement," and must in a general way correspond to the amusements specified. (In re Hull, 475.)

3. What is designated as a "scenic railway," being a railway constructed of rails and on which cars are run for the purposes only of amusement, where the track is elevated a considerable distance above the ground at the place of beginning and is built on an incline with intervening elevations, and the cars are propelled by the force of gravity, is not "such place of public amusement" as a "merry-go-round," and is not prohibited from being kept open on Sunday by the provisions of sec. 6825 of the Rev. Codes. (In re Hull, 475.)

4. An amusement that is not *per se* unlawful or criminal and is not in itself immoral or dangerous or detrimental to the public health will not be included within the provisions of the statute prohibiting certain specified public amusements and other like and similar amusements on Sunday, unless the same is forbidden by the

**SUNDAY LAWS (Continued).**

statute either in direct terms or by clear implication. (In re Hull, 475.)

5. A moving picture show or exhibition comes within the inhibition of sec. 6825, Rev. Codes, which forbids the opening or conducting upon Sunday of "any theater, playhouse . . . . circus or show . . . . or any such place of public amusement." (In re Bossner, 519.)

**SURETYSHIP.**

See Guaranty.

**TAXATION.*****Property Taxable—Indebtedness.***

1. Under the provisions of our statute, the indebtedness of a county becomes a burden upon all of the taxable property brought within the county after the creation of such indebtedness, as well as upon the taxable property that was within the county at the date of the creation of the indebtedness. (Blake v. Jacks, 70.)

2. Under the provisions of sec. 1963, Rev. Codes, which pledges the faith, credit and all taxable property within the limits of the county as it was constituted at the time the indebtedness was incurred for its payment, all taxable property subsequently brought into the county is liable for its proportionate share of such indebtedness. (Blake v. Jacks, 70.)

***Tax on Bank Stock—Payment by Bank—Reimbursement.***

3. Under the statute of this state (sec. 1672, Rev. Codes) the shares of stock in banks must be assessed against the owners of such stock and the tax thereon must be paid by the bank. The liability on the part of the bank under this statute to pay the taxes assessed against the stock carries with it an implied lien in favor of the bank and against the stock and the earnings, dividends and profits derived therefrom for reimbursement in the sum so paid. (Shainwald v. First National Bank of Weiser, 290.)

4. The claim and demand of a bank for reimbursement for moneys paid as taxes on the shares of stock held by its shareholders follows and attaches to the stock and its earnings, profits and dividends, irrespective of any sale or transfer which may be made of such stock. (Shainwald v. First National Bank of Weiser, 290.)

5. Where S. sold his shares of stock in a national bank subsequent to the date on which taxes attach for the year and prior to the payment of such taxes by the bank, the bank cannot thereafter pay over the earnings and dividends from the stock to the purchaser of such stock and then maintain a personal action against the vendor of the stock for recovery of the taxes so paid subsequent to the sale



**TAXATION (Continued).**

and transfer of the stock. (Shainwald v. First National Bank of Weiser, 290.)

6. Where a bank pays the taxes against the shares of stock owned by its stockholders, it cannot lawfully charge the same up against the aggregate earnings of the bank as current expense or otherwise, but must charge the amount paid against the shares of stock on which such payment was made or against the present owner of such stock. (Shainwald v. First National Bank of Weiser, 290.)

**Tax Sale and Deeds.**

7. A recitation in a tax deed as follows: "That the said least quantity or smallest portion of interest in said land lying and being within said Ada county, as hereinafter described . . . was by the said H. E. Neal, as treasurer of said Independent School District of Boise City, sold and struck off to said W. F. Locke who paid the full amount of said taxes, costs and charges," *held* sufficient to make a *prima facie* case on the question that that was the least quantity or smallest portion of the property sold that the purchaser would take and pay taxes and costs. (Wilson v. Locke, 582.)

8. It is not within the power of the legislature to declare that a tax deed is conclusive evidence of a compliance with all of the requirements that are essential to the exercise of the taxing power, and thus deny the right to defend title against a tax deed as to all jurisdictional questions. (Wilson v. Locke, 582.)

9. That provision of section 177 of the Special and Local Laws of Idaho, p. 40, to wit, that "Any deed derived from the sale of real property under this act shall be conclusive evidence of title except as against actual frauds or prepayment of taxes upon which such sale was made," etc., in so far as it would deny the right to defend title against a tax deed, *held* unconstitutional, as it would result in the confiscation of property without due process of law. (Wilson v. Locke, 582.)

10. Under the provisions of sec. 1765, Rev. Codes, a tax deed duly acknowledged and proved is *prima facie* evidence of the regularity of all of the proceedings therein from the assessment up to the execution of the tax deed. The provisions of that section shift the burden of proof. (Wilson v. Locke, 582.)

11. Where it is made the duty of the treasurer of the school district to make the sale of land for delinquent school taxes, it is sufficient if the clerk of the school board attends and makes the sale at the instance and request of the treasurer. (Wilson v. Locke, 582.)

12. The record fails to show that the trial court rejected any evidence offered to show that any of the jurisdictional requirements

**TAXATION (Continued).**

of the law in this matter had not been complied with. (*Wilson v. Locke*, 582.)

See Highways; License Taxes.

**TELEGRAPH COMPANIES.***Liability for Negligence in Transmitting Messages.*

1. A sender of a telegraphic message does not constitute the telegraph company his agent and is not bound to the receiver of the message by the terms of the message as negligently changed or altered by the company. (*Strong v. Western Union Tel. Co.*, 389.)

2. A telegraph company is a public service corporation engaged in a public utility, and in receiving, transmitting, and delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort the same as other principals. (*Strong v. Western Union Tel. Co.*, 389.)

3. Where S. & S. sent a telegram to C. L. S. & C. Co., inquiring if the company would honor draft in payment for 84 head of steers at \$3.95 per hundred, and the telegraph company negligently changed or altered the message so that when received at its destination and delivered to the sendee it read \$3.25 instead of \$3.95, and the stock was shipped and C. L. S. & C. Co. paid therefor at the rate of \$3.25, if S. & S. acted prudently and with due diligence after discovering the mistake, so as to minimize the damage and loss, the measure of damage which they will be entitled to recover from the telegraph company for its tort will be the difference between the market value of the stock the day the message was sent and the price actually paid by C. L. S. & C. Co. (*Strong v. Western Union Tel. Co.*, 389.)

4. *Held*, that the evidence in this case shows negligence on the part of the telegraph company, and that the sufficiency of the complaint, not having been challenged by demurrer or upon the introduction of evidence, but being first challenged by a motion for a nonsuit, which is not a ground for a nonsuit, that upon a reversal of this case the plaintiff should be allowed to amend his complaint so as to allege negligence in the transmission of said telegram. (*Strong v. Western Union Tel. Co.*, 389.)

5. Where a telegraph company fails to transmit a message correctly, the proof of that fact is *prima facie* evidence of the company's negligence. (*Strong v. Western Union Tel. Co.*, 389.)

6. If the failure to correctly transmit a telegram was not the result of the negligence of the company, the means of showing that fact is within the possession of the company, and it may show it as a defense. (*Strong v. Western Union Tel. Co.*, 389.)

## TELEGRAPH COMPANIES (Continued).

7. *Held*, that the evidence shows that said telegram was delivered to the agent of the company for transmission and was accepted by it; that the company made a mistake in its transmission, and that showing made a *prima facie* case in favor of the plaintiff, and the court erred in granting a nonsuit and entering a judgment of dismissal. (Strong v. Western Union Tel. Co., 389.)

8. *Held*, that the contract for the sale of the cattle was made with the commission company. (Strong v. Western Union Tel. Co., 389.)

*Rules Limiting Liability of Company.*

9. A telegraph company is chartered for public purposes, has the power of eminent domain, is a public agent and exercises *quasi*-public employment, and is required to perform the duties it was chartered to perform with the same care, skill and diligence that a prudent man would, under like circumstances, exercise in his own affairs, and it is contrary to public policy to permit it by rules and regulations to restrict its liability for damages resulting from its own negligence or carelessness. (Strong v. Western Union Tel. Co., 389.)

10. The reasonableness or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stipulation which exempts such company from damages for its own negligence is void. (Strong v. Western Union Tel. Co., 389.)

## TITLE OF ORDINANCES.

See Municipal Corporations, 12-16.

## TORT.

See Actions, 1.

## TRANSCRIPTS.

See Appeal and Error, 8-15.

## TRIAL.

*Instructions.*

1. *Held*, that the court did not err in refusing to give certain instructions requested by the defendant. (State v. Harris, 620.)

2. Under the provisions of sec. 7940, Rev. Codes, instructions given by the court on its own motion will not be reviewed on appeal unless exception thereto is duly taken and embodied in a bill of exceptions. (State v. Harris, 620.)

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**TRIAL (Continued).****Verdict.**

3. Where an action is brought to recover for money had and received and for services alleged to have been performed at the instance and request of the defendant, and the answer in effect denies the allegations of the complaint and sets up by way of cross-complaint certain damages alleged to have been sustained by the defendant on account of the neglect and incompetency of the plaintiff in performing certain services for defendant, and the cause is tried by the court with a jury, and the jury renders a verdict in favor of the plaintiff on his first cause of action and in favor of the defendant on the second cause of action, and does not mention the cause of action set out in the cross-complaint, the effect of such verdict is that the defendant is not entitled to recover on the alleged cause of action set up in the cross-complaint. (*Featherstone v. Keane*, 24.)

4. This being an action at law, the jury by its verdict in effect found upon all of the issues presented. (*Featherstone v. Keane*, 24.)

**Findings.**

5. There is no necessity for findings upon immaterial issues nor upon facts alleged in the complaint and admitted by the answer. (*Fouch v. Bates*, 374.)

6. Findings should be of ultimate facts and not of probative facts; but a finding of probative facts is sufficient if the required ultimate fact necessarily results from the probative facts. (*Fouch v. Bates*, 374.)

7. *Held*, that the issues tendered by the allegations of the complaint and not denied by the answer in connection with the findings of fact made by the court are sufficient to sustain the judgment. (*Fouch v. Bates*, 374.)

8. Findings must be liberally construed in support of the judgment. (*Fouch v. Bates*, 374.)

See Continuance; Criminal Law, 7-9; Jury.

**USURY.**

1. A stipulation to pay back exchange on borrowed money is not usurious unless it appears that such stipulation is a device to cover a usurious contract and it was not intended that the money should be remitted to the place to which exchange is provided. (*Tipton v. Ellsworth*, 207.)

2. Under the provisions of subd. 5 of sec. 3459, Rev. Codes, an attorney's fee may be legally stipulated for in case payment shall not be made at maturity, and such stipulation is not a usurious contract. (*Tipton v. Ellsworth*, 207.)

## VARIANCE.

See Pleading, 10.

## VENDOR AND VENDEE.

*Fraud and Misrepresentation.*

1. *Held*, that the evidence is not sufficient to show that the respondents knowingly and intentionally misrepresented the area of land contained in block 29, and for that reason the court did not err in sustaining the motion for a nonsuit as to the first cause of action. (*Bumpas v. Stein*, 578.)

2. *Held*, that plaintiff's evidence made a *prima facie* case under the allegations of the second cause of action and that the court erred in granting a nonsuit therein. (*Bumpas v. Stein*, 578.)

3. *Held*, that there was no fraud, deception or failure of consideration in the contract for the sale of the land involved in this case. (*Tipton v. Ellsworth*, 207.)

4. Where an original contract has been made for the purchase of land and under that contract the purchasers take possession of the land and have full opportunity to ascertain all of the facts in regard to the water rights and roads connected therewith, and thereafter procure the seller to waive the contract and to deliver them a deed for the premises, and execute a mortgage for the purchase price upon different terms from that provided by the original contract, they thereby waive any question of fraud in the original contract. (*Tipton v. Ellsworth*, 207.)

5. The evidence *held* sufficient to sustain the finding of facts. (*Keating v. Keating Mining Co.*, 660.)

*Rescission of Conveyance.*

6. Where a seller receives the entire purchase price of the property sold and acquiesces in the transaction after he has had full knowledge of all the facts concerning it, he is estopped from a rescission of the contract by reason of his laches and neglect. (*Keating v. Keating Mining Co.*, 660.)

7. In an action for rescission of a contract, it is sufficient if the plaintiff makes offer to restore or to do equity in his complaint, as it is always within the power of the court to require that the person invoking equity shall do equity as a condition of relief, and the court may impose terms which may be just and equitable and may enforce compliance therewith. (*Gamblin v. Dickson*, 734.)

8. The rule is different in an action at law based upon a rescission of the contract by one of the parties, and such distinction arises out of the difference between the powers of the two courts—equity and law. (*Gamblin v. Dickson*, 734.)

**VENDOR AND VENDEE (Continued).**

9. In the case at bar the plaintiff has not attempted to abrogate or rescind the contract of sale by his own act, but has by this action sought to have it rescinded by judicial proceedings. (*Gamblin v. Dickson*, 734.)

10. Evidence *held* sufficient to support the finding of facts. (*Gamblin v. Dickson*, 734.)

***Timber—Innocent Purchaser.***

11. Where S. has an option to purchase certain lands, and sells the standing timber thereon to B. and thereafter procures the title to said land to be conveyed to N., and contracts with N. to protect S. in his contract with B., without B.'s knowledge or consent, and thereafter N. sells the land to D. & D., who are innocent purchasers, without reserving the rights of B. to take such timber from said land, *held*, that S. is liable to B. for whatever damages he sustained by being prevented from removing the timber from said land. (*Bell v. Shields*, 649.)

***Capacity of Vendee to Take Title.***

12. Where an owner has sold and conveyed real estate, and has received the purchase price therefor, he can neither legally nor equitably question the capacity of the vendee to take and hold the title. (*Keating v. Keating Mining Co.*, 660.)

**VENUE, CHANGE FOR PREJUDICE OF JUDGE.**

1. Where a party moves in the district court for a change of place of trial, on the grounds of the prejudice of the judge, it is not sufficient for him to state that "he has good reason to believe, and does believe, that he cannot have a fair and impartial trial," etc., but he must state the facts upon which he predicates his charge of prejudice and claims the right of a change of place of trial. (*Bell v. Bell*, 636.)

2. The prejudice of a judge contemplated by the constitution (sec. 18, art. 1) is a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the presiding judge could or would give the litigant a fair and impartial trial in the particular case pending. (*Bell v. Bell*, 636.)

**VERDICT.**

See Trial, 3, 4.

**VILLAGES.**

See Municipal Corporations.

**VOTING.**

See Elections.

## WARRANTY.

See Sales.

## WATERS AND WATERCOURSES.

*Organisation of Irrigation District.*

1. "The holders of title or evidence of title" or entrymen "on lands under any law of the United States or of this state," who have received receipts or other evidence of their rights as such entrymen, are competent and proper persons to sign a petition for the organization of an irrigation district under the provisions of sec. 2372, Rev. Codes, and such petitioners may be counted in computing the requisite number of signers or holders of title or evidence of title to lands susceptible of irrigation under a common system of irrigation. (*Gem Irrigation District v. Johnson*, 386.)

*Water Contracts—Abandonment—Purchase.*

2. Under the facts and circumstances of this case, *held*, that the equities are with the respondent, and that the judgment of the trial court should be affirmed. (*Jackson v. Indian Creek Reservoir Ditch and Irr. Co.*, 513.)

3. *Held*, that there are sufficient facts and circumstances shown by the record to support the findings and judgment of the court to the effect that certain holders of water contracts had abandoned their water rights and ceased to use the same or claim or assert any right under them for more than five years. (*Jackson v. Indian Creek Reservoir Ditch and Irr. Co.*, 513.)

4. Where it is contended, as in this case, that one of the parties to the action has by purchase or otherwise acquired the rights of both of the contracting parties to a given contract granting a perpetual water right, and that such party is successor in interest by purchase or otherwise of all of the rights held by both the obligor and obligee, and the party seeks a decree whereby it may be permitted to pro-rate as successor to such contracts with the holder of another like and similar water contract, *quære*, as to whether such facts constitute an extinguishment of the original contract. (*Jackson v. Indian Creek Reservoir Ditch and Irr. Co.*, 513.)

*Purchase of Perpetual Water Right from Irrigation Company.*

5. A purchase of a perpetual water right from an irrigation company, with the right to receive the water so purchased from the company's canal, carries with it such a right in the appropriation itself and such an easement or servitude in the canal system as to authorize and enable the purchaser himself to go upon the property and protect the appropriation and maintain the diversion, and repair the canal, and carry the water through the canal system to the extent of the purchaser's water right, in the

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WATERS AND WATERCOURSES (Continued).

event the company fails, neglects or refuses to do so. (Idaho Fruit Land Co. v. Great Western Beet Sugar Co., 1.)

## WEIGHTS AND MEASURES.

See Criminal Law, 1, 2.

## WILLS.

*Construction—Estate Created.*

1. The cardinal rule to be applied in the construction of a will is to gather the intent of the testator from the language he has employed in the will, and this intent is to be ascertained from a full view of everything within the "four corners of the instrument." This rule must be understood and applied in connection with that other rule to the effect that a clearly expressed intention in one portion of the will is not to yield to a doubtful construction in another portion of the instrument. (Wilson v. Linder, 438.)

2. Where a testator provided by a will as follows: "My son Jesse shall have the home place. [Here follows a description of the property.] . . . But should my son Jesse die without any wife or children, the property herein conveyed to him shall be equally divided between my other four children, or their heirs, share and share alike"—held, that the devisee, Jesse Wilson, took a limited estate only, subject to the vesting of an absolute and fee simple title on his leaving surviving him at the time of his death a wife or child, and that the remaindermen had only an expectancy which might be vested in them as an absolute estate upon the contingency of Jesse Wilson dying without either wife or child. (Wilson v. Linder, 438.)

3. Where a contingency named in a will upon which an absolute estate may vest in one devisee as against another is unlimited as to time and is such a contingency as may never occur either prior or subsequent to the death of the testator, and may also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee. (Wilson v. Linder, 438.)

## WRIT OF REVIEW.

See Certiorari.

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